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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND
CONSTRUED, AND AN INDEX.

GEO. W. SELF,
OFFICIAL REPORTER.
SOL. H. ESAREY, Assistant Reporter.

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FRANK S. ROBY.†§
HON. WOODFIN D. ROBINSON.||*
HON. DAVID A. MYERS.‡
HON. JAMES B. BLACK.||
HON. DANIEL W. COMSTOCK.||
HON. ULRIC Z. WILEY.||

†Chief Judge at November Term, 1905.

*Chief Judge at May Term, 1906.

||Elected in 1896, reelected in 1898 and 1902.

§Appointed March 21, 1901; elected in 1902.

‡Appointed October 18, 1904; elected 1904.

OFFICERS
OF THE
APPELLATE COURT

ATTORNEY-GENERAL
CHARLES W. MILLER.

REPORTER
GEO. W. SELF.

CLERK
ROBERT A. BROWN.

SHERIFF
MICHAEL McGUIRE.

LIBRARIAN
OMAR O'HORROW.

In Memoriam.

Theodore P. Davis was born in the year 1855, upon a farm near Sheridan, Hamilton county, Indiana. He was of Welsh lineage, and his ancestors, who lived near Charlottesville, in Mecklenburg county, North Carolina, were active in the Revolutionary army, and were participants in the Mecklenburg convention.

His early life was spent in the hard work of the farm, in the course of which he was able to get sufficient instruction in the common schools of the county to equip him as a teacher. He had a strong desire for knowledge, and acquired it in every way that was open to him. His education in the common schools was supplemented at Lebanon, Ohio, where he made considerable addition to his qualifications for teaching, and he began at the age of seventeen years to teach in the schools of his native county. In 1873 he removed to Noblesville and taught in the public schools of that city. It was his ambition while on the farm and teaching in the schools to become a lawyer, and he devoted all of his spare time to the preparation of himself for the legal profession. He made very rapid progress as a law student, and in 1874 was admitted to the bar and entered the office of Moss & Kane, which was a leading firm of lawyers at Noblesville. Subsequently, at the age of twenty-one years, he became a partner of Mr. Kane's, and this partnership continued until his election as one of the judges of the Appellate Court. The firm of Kane & Davis had quite a large practice and was employed in some of the most important litigation in the state and federal courts. He had acquired such a standing among the lawyers of the State that he was, in 1892, nominated by the Democratic party as one of its candidates for the appellate bench,

THEODORE P. DAVIS.

and was elected to that position, where he served a term of four years.

As an appellate judge he was distinguished for his legal attainments, his probity, and his high conception of judicial duty. He was remarkably clear and strong in his perception of vital points and principles, and was able to strip a case of its adventitious circumstances, and reach the very heart of the controversy. Among his associates on the bench he was distinguished for this quality, and it was always invoked by them in reaching a conclusion. Frequently, where his associates were equally divided upon the law or the facts of a case, the final decision of controverted propositions was left to him. His written opinions were always lucid and cogent, and helped to promote and advance the reputation of the court.

At the close of his term as appellate judge he formed a partnership for the practice of the law at Indianapolis with Frank E. Gavin, who had been one of his associates on the appellate bench, and the friendship which was established between him and Judge Gavin on the bench has continued throughout their partnership, which lasted until his death.

The standing of Judge Davis among his brethren at the bar was evidenced by his unanimous election to the presidency of the State Bar Association, and he also served several terms as the treasurer of that association. He was also a member of the American Bar Association.

He was a faithful and consistent member of the First Presbyterian Church of Indianapolis, and always took an active interest in the affairs of the church. He was also a member of the Masonic order (in which he had taken the 32d degree), the Mystic Shrine, the Independent Order of Odd Fellows, the Red Men, and the Knights of Pythias. He was also a member of the leading civic and literary clubs of Indianapolis.

He was a delegate to the Democratic national convention at Cincinnati in 1880.

IN MEMORIAM.

He was married at Piqua, Ohio, in 1877, to Miss Anna F. Gray, who was his devoted and efficient helpmeet through life, and she and their three children survive him.

Judge Davis was a marked example of the fact that culture and education are not given by the colleges alone, but are acquired by many men to whom these educational opportunities are not open. His culture was broad and humane, and permeated his entire character. His frank and genial disposition under all trials and difficulties made him hosts of friends who will lament his death as a personal loss. In all his legal controversies he was perfectly fair and honorable towards his opponents, and never failed to receive from the courts in which he practiced that respectful consideration which he always showed to them. The younger members of the bar who came in contact with him as a judge and as a lawyer have abundant reason to be grateful for his uniform kindness and courtesy towards them. The hardships of his early life had taught him sympathy with their struggles, and he was always ready to lend them a helping hand.

NOBLE C. BUTLER,
Chairman.

JAMES B. BLACK,
JAMES E. McCULLOUGH,
CHAS. W. SMITH,
JOHN E. HOLLETT,
Committee.

LARZ A. WHITCOMB,
Secretary.

[Judge Gavin, a former member of this Court, presented on behalf of the committee, the foregoing memorial. In doing so, he spoke eloquently and with deep feeling of the worth of the deceased and of the loss occasioned to society and the profession by his death.—Reporter.]


THEODORE P. DAVIS.

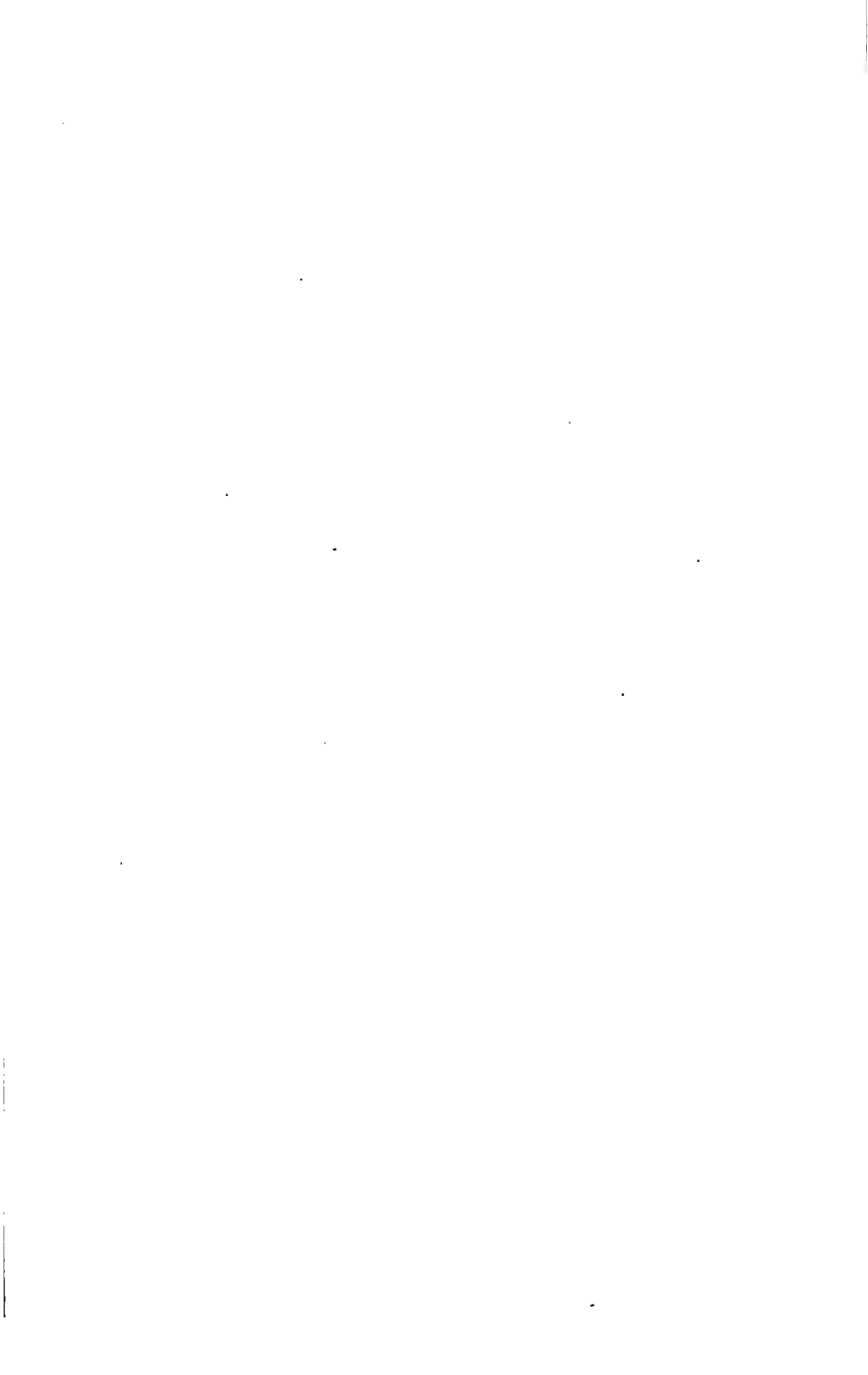
COMSTOCK, C. J.:

In behalf of the court, it is my privilege to concur in the deserved and fitting tribute to which we have listened. So good a subject for fair eulogy, as is presented by the record of Judge Davis, is rarely found. Briefly, I may be permitted to say of him that he was most fortunate in his professional and personal reputation, and in his public and private career. It would be idle to attempt to add to the memorial of the committee, or to the tribute paid by one so well qualified as Judge Gavin, by reason of close association upon the bench, at the bar and in social life "to speak him fair" and who has brought to the discharge of his loving office, the kindly but discriminating judgment of a friend.

Let us hope that at the close of life's little round, each one of us may as well merit the commendations so honestly accorded Judge Davis.

The written memorial will be spread upon the minutes of the court, and will appear in the next volume of its reports.





CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1905, AND MAY
TERM, 1906, IN THE NINETIETH YEAR OF
THE STATE.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. LOOS.

[No. 5,409. Filed May 11, 1906.]

EVIDENCE.—Railroads.—Setting Fires.—Other Fires.—Where the court, in an action against a railroad company for negligently setting fires, admitted in evidence, over defendant's objection, the question: "You may state, Mr. Dare, what you observed, if anything, on mornings prior to April 12 at the time of the passage north of this through train," and the answer: "I have observed they were blowing a good many sparks, and they set the grass afire and the shed of the old distillery this side of the cattle pens several times, and I went up there several times and put it out, and it was a precaution in dry weather that we follow the train up morning and evening," and defendant moved unsuccessfully to strike out, because irresponsible, the following part of the answer: "It was a precaution in dry weather that we follow the train up," it was held: Comstock, J., it was reversible error to overrule the motion to strike out such evidence; Roby, C. J., it was not reversible error to overrule the motion to strike out such evidence; Robinson and Wiley, JJ., it was error to admit such evidence; Comstock, Wiley and Myers, JJ., it was error to admit evidence of fires set by different engines at other times and places; Roby, C. J., the evidence admitted was proper for the purpose of showing notice to the defendant of the danger, from sparks, to adjoining property, and being competent for one purpose, was properly admitted.

From Franklin Circuit Court; *Ferdinand S. Swift*, Judge.

Action by Albert Loos against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed*.

Florea & Broaddus, for appellant.

Martin J. Givan, Edgar O'Hair and James M. Benson, for appellee.

COMSTOCK, J.—Appellee brought this action against appellant to recover damages alleged to have been occasioned by the negligent escape of fire from a certain locomotive of appellant's in passing a certain slaughterhouse and stock pens situate near the track of appellant. The cause was put at issue and tried before a jury which returned a verdict in favor of appellee for \$1,200. The jury also returned answers to interrogatories. Over appellant's motion for judgment in its favor on answers to interrogatories notwithstanding the general verdict, and its motion for a new trial, judgment was rendered in favor of appellee on the verdict for the amount named therein. Appellant relies for reversal, as stated in its brief, upon the rulings of the court upon said two motions.

As to the action of the court in overruling the motion for judgment on answers to interrogatories we need only refer to the settled rule that answers to interrogatories will prevail over the general verdict only when there is an irreconcilable conflict between them. The interrogatories and answers are not numerous and we give them.

"(1) Was not the engine of the defendant which is alleged to have caused the fire that burned the plaintiff's property described in the complaint known as 102? A. Yes. (2) Was not said engine provided with a spark-arrester of the best approved kind or equal to the best in use? A. No. (3) Was not the spark-arrester on the engine of the defendant which is claimed to have started the fire of the most approved style and the best known or equal to the best, for the prevention of the escape of fire? A. We do not know. (4) Was the spark-arrester on the engine claimed to have fired the plaintiff's property in good repair? A. We do not know. (5) If you answer 'No' to interrogatory No. 4, state specifically wherein the spark-

Cleveland, etc., R. Co. v. Loos—38 Ind. App. 1.

arrester was out of repair. A. ————. (6) Was not the engine claimed to have fired the plaintiff's property and going through West Harrison, Indiana, properly operated by a skilled engineer? A. No. (7) If you answer 'No' to question No. 6, state specifically wherein the engine was not properly operated. A. The engine was run at a high and dangerous rate of speed. (8) Was not the engineer in charge of engine at the time of the fire a skilled engineer? A. No. (9) If you answer 'No' to question No. 8, state specifically wherein said engineer was not skilled. A. The engineer run his engine No. 102 out of Harrison, Ohio, April 12, 1903, at a high and dangerous rate of speed and did not shut draft off engine in passing cattle sheds. (10) Did not the fire originate off of the defendant's right of way? A. It did."

There is a failure to answer some of these interrogatories. Some of the answers are inconsistent with others. This does not make the irreconcilable conflict contemplated by the statute, and so the general verdict should stand.

Appellant complains of the action of the court in refusing to require the jury to answer definitely interrogatories three, four and five. "It is the duty of the court, expressed in numerous decisions of the Supreme Court, to require a jury to give definite and specific answers to interrogatories when the evidence will warrant it." *Hammond, etc., R. Co. v. Spyzchalski* (1897), 17 Ind. App. 7, 20, and cases cited; *Hallwood Cash Reg. Co. v. Dailey* (1905), 70 Kan. 620, 79 Pac. 158. There was evidence before the jury to warrant answering definitely the foregoing questions, and it was therefore error not to require them to do so.

Appellee insists that the refusal of the court is not available error, because the answers to other interrogatories are such as to prevent recovery by the complaining party; citing, *Wolf v. Big Creek Stone Co.* (1897), 148 Ind. 317; *Grand Rapids, etc., R. Co. v. Cox* (1893), 8 Ind. App. 29.

We gather from the opinion in the first-named case that answers were returned to three interrogatories, and that one of the reasons for a new trial was based upon an instruction directing the jury to return more definite answers to these interrogatories. The court say: "Whether there was error in this we need not inquire, for the reason that even if the three answers were to be taken as originally returned, as appellants contend they ought to be, yet such answers, together with the remaining answers, over two hundred in number, would show such a state of facts as must preclude any recovery by appellant."

And in the case of *Grand Rapids, etc., R. Co. v. Cox, supra*, the court say: "Where the answers to interrogatories refused could not have controlled the general verdict, there is no available error in refusing them." We can not say that the answers to the interrogatories before us might not have controlled the general verdict. We can not say what answers the jury may return to interrogatories, further than that they would be governed by the evidence, nor how such answers may influence the individual juror. When particular facts, entering into the general verdict are shown, by answers to interrogatories, the inconsistency between the facts thus specially found and the general verdict may be so apparent that jurors will be unwilling to assume the responsibility of such inconsistency. The evidence, without contradiction, shows that the spark-arrester was equal to the best device in use to prevent the escape of fire and in perfect order. The engineer, a man of large experience, testified that he knew nothing that could have been done, more than was done, to prevent the throwing of fire, and at the same time practically operate the train.

George Blaicher testified in behalf of appellee as to the burning of the property. Upon cross-examination appellant asked him the following question: "Well now, don't you know, George, that it was rumored around there that you started that fire?" Plaintiff's objection to the question

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was sustained. The defendant then asked the following: "I will ask you to state to the jury, George, if you have not heard the charge that you were in there and started that fire." Plaintiff's objection to the question was sustained, and the defendant then offered to prove that the witness, soon after the fire, was informed that it was rumored that he had set the building on fire. The court still sustained the objection. In this ruling of the court we think there was no error.

Plaintiff introduced a witness—Charles Dare—and, for the purpose of proving facts from which the inference might be drawn that the spark-arrester of the engine in question was out of repair, showed by the witness that at the time this particular train and engine passed his mill, situate just north of the depot at Harrison, he was standing in the ware-room of the mill, which is located next to the railroad and is covered with a tin roof. Plaintiff next asked the witness the following question: "You may state, Mr. Dare, what you observed, if anything, on mornings prior to April 12 at the time of the passage north of this through train." Defendant objected to the question on the ground that it was not shown that upon other mornings this same engine was pulling the train referred to in the question. Objection was overruled and the witness answered: "I have observed they were blowing a good many sparks, and they set the grass afire and the shed of the old distillery this side of the cattle pens several times, and I went up there several times and put it out, and it was a precaution in dry weather that we follow the train up morning and evening." Defendant moved to strike out that part of the answer of witness to the question in which he said, they took the precaution in dry weather to follow the train up, for the reason that it was not responsive to the question. The motion was overruled. This was error. If the fire in question was set by any locomotive of the appellant company, its loco-

motive No. 102 was clearly identified as the one at fault. Under such circumstances it was competent to show that the same locomotive, on the same trip, at about the same time and place, set other fires in its passage, as raising an inference of some weight that there was something defective in its construction and management. *Patton v. St. Louis, etc., R. Co.* (1885), 87 Mo. 117, 56 Am. Rep. 446. But where it is shown that a particular engine set fire to property, it is not competent to show generally that the defendant's engines have caused fires at other times and places. *Ireland v. Cincinnati, etc., R. Co.* (1890), 79 Mich. 163, 44 N. W. 426; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.* (1891), 27 Fla. 1, 9 South. 661, 17 L. R. A. 33; *Chicago, etc., R. Co. v. Gilmore* (1899), 22 Ind. App. 466, and cases cited. The reported cases are not in accord upon this question, but *Chicago, etc., R. Co. v. Gilmore, supra*, is the latest expression in this State. The motion to strike out the part of the above answer should have been sustained. It was not responsive and would not have been admissible even if responsive.

The various paragraphs of the complaint are upon the theory of the insufficiency or want of repair of a spark-arrester on appellant's locomotive. Certain instructions given by the court involve the question of the negligent operation of the engine irrespective of the insufficiency or want of repair of the spark-arrester. Such instructions were outside the issues. The recovery, if at all, should be upon the negligence alleged in the complaint.

We do not deem it necessary to consider other alleged errors. We express no opinion as to the merits of the case. For the errors stated the judgment is reversed, with instructions to sustain the motion for a new trial.

Black, P. J., absent.

ROBINSON, J.—I do not agree with the opinion so far as it holds that there was error in the court's refusal to require more definite answers to the interrogatories. But

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the judgment should be reversed because of the admission of the evidence mentioned in the opinion.

MYERS, J.—The admission of the evidence as to fires caused by other engines than the one averred in the complaint at other times and places was improper, and for this reason alone I think the case should be reversed.

WILEY, J.—I concur in the conclusion upon the ground stated by Robinson and Myers, JJ.

Roby, C. J., dissents.

DISSENTING OPINION.

ROBY, C. J.—Appellee sued to recover damages on account of the destruction by fire of certain buildings in the town of West Harrison. The complaint was in three paragraphs, and the issue was formed by a general denial; verdict for \$1,200 returned with answers to interrogatories; motions by appellant for judgment, notwithstanding the general verdict and for a new trial, overruled and judgment rendered on the verdict.

The fire in question was averred to have been negligently set by sparks from an engine attached to one of appellant's through passenger-trains, on April 12, 1902. The complaint, in my judgment, contains a charge of negligence other than in failing to furnish a sufficient spark-arrester. The failure to furnish such spark-arrester is unquestionably averred. In instruction six, given at appellant's request, it was stated: "The plaintiff has alleged two specific acts of negligence in the operation of its locomotive, viz., that the spark-arrester was insufficient and out of repair, and that the locomotive was run up grade at a high and dangerous rate of speed."

In instruction number four, given at appellee's request, the jury was told, among other things, that if "plaintiff's property was destroyed by fire, which was caused by the negligence of the defendant railroad company, either in negligently and recklessly operating its locomotive engine,

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or in negligently failing to have its engine equipped and provided with the proper spark-arrester," it might find for the plaintiff. It is evident that the cause was tried upon the theory that the engine was negligently operated in view of the conditions which existed.

In the second paragraph of the complaint it is averred that on said day plaintiff was in possession of a certain building and cattle pens situate in the town of West Harrison; that said building was covered with a shingle roof, the gable end fronting the track of defendant's railroad and situate a distance of thirty feet from it; that said pens were covered with a board roof, joined said building, and were situate a distance of four or five feet from said track; that on said day, by its agents in charge of its through passenger-train, running from Cincinnati to Ft. Wayne, in running its engine and train from the railroad station in said town, at which said train had stopped, it negligently operated said engine attached to said train in passing from said station in said town, through said town, without having a sufficient spark-arrester on the engine; "that said defendant, by its agents in charge of said engine and said passenger-train, did carelessly, recklessly and negligently, in the operation of said engine and through passenger-train, cause said engine to reach a high and dangerous rate of speed, to wit, forty-five miles per hour, within a short distance of said railroad station, in said town, after starting therefrom, and while within the corporate limits of said town; that from said railroad station aforesaid to the premises occupied by plaintiff is an up grade and a distance of a quarter of a mile, and that said defendant, by its agents in charge of said locomotive engine and through train, did recklessly, carelessly and negligently cause said engine and through train to pass the premises occupied by said plaintiff at such high and dangerous rate of speed so that by reason of the reckless, careless and negligent operation of said engine by said agents in charge thereof said engine, by reason of its having

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no sufficient spark-arrester, emitted and threw out large sparks and coals of fire, which live sparks and coals of fire so emitted and thrown out by said engine fell upon the board roof of said cattle pens; * * * that said fire was caused and said cattle pens and buildings wholly burned up and destroyed by reason of the reckless, careless and negligent operation of said engine attached to said through passenger-train, in passing from said railroad station in said town of West Harrison, through said town, by said defendant." The statement "that said engine, by reason of its having no sufficient spark-arrester, emitted and threw out large sparks and coals of fire" is, in my opinion, to be taken as additional to the charge of negligent operation and not as limiting the theory of the complaint to the charge of failing to provide a sufficient spark-arrester. I think this proposition is conclusively established by the case of *Pittsburgh, etc., R. Co. v. Wilson* (1904), 161 Ind. 701. See *Chicago, etc., R. Co. v. Zimmerman* (1895), 12 Ind. App. 504, 506; *Lake Erie, etc., R. Co. v. McFall* (1905), 165 Ind. 574. Under the authority of the case last cited, there being an averment of negligence in emitting and throwing out sparks and coals of fire, the complaint is sufficient upon the theory of such alleged negligent operation.

The main opinion holds that the judgment should be reversed on account of the action of the court in refusing to require the jury to answer more definitely interrogatories three and five. They were directed to the style, quality and repair of the spark-arrester. They were answered: "We do not know." Had such interrogatories been answered in the affirmative, exactly as appellant contended they should have been, the effect would have been nullified by interrogatory two, and its answer, which was as follows: "Was said engine provided with a spark-arrester of the best approved kind, or equal to the best in use? A. No." *Chicago, etc., R. Co. v. Gilmore* (1899), 22 Ind.

App. 466. Waiving the inconsistent answers, there was no error in the action of the court, the general verdict establishing negligence in the operation of the train, and there being nothing in the interrogatories and their answers tending to negative such alleged negligence. The refusal to require more definite answers is not, therefore, available, they being in any event ineffective to overthrow the general verdict. *Grand Rapids, etc., R. Co. v. Cox* (1893), 8 Ind. App. 29; *Wolf v. Big Creek Stone Co.* (1897), 148 Ind. 317.

The witness Dare testified that he was in his mill, about five blocks south of the buildings destroyed, on the morning in question; that he heard the train pass; that the exhaust seemed to be heavy from the engine; that the roof on the warehouse was of tin; that he heard cinders falling upon it very distinctly, which was a matter of daily occurrence. He was asked what he had "observed, if anything, on mornings prior to April 12, at the time of the passage north of this through train." An objection was made to this question on the ground that it was not shown that upon other mornings this same engine was pulling the train referred to in the question. The objection was overruled, and the witness answered: "I have observed that they were blowing a good many sparks, and they set the grass afire and the shed of the old distillery this side of the cattle pens several times, and I went up there several times and put it out, and it was a precaution in dry weather that we follow the train up morning and evening." A motion to strike out the last sentence, as not being responsive to the question, was overruled. I think it should have been sustained, but I do not think that the error was a reversible one. The quality of appellant's acts in the operation of its engine, as being negligent or not, was dependent upon the existing conditions known to it. The evidence sought to be elicited by the question under consideration was admissible, as tending to show notice to the defendant of the danger to adjoining

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property, caused by fire thrown from its locomotive leaving the station and running up grade at its schedule rate, past the mill and building destroyed. *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.* (1900), 154 Ind. 322; *Wabash R. Co. v. Miller* (1902), 158 Ind. 174; 2 Thompson, Negligence (2d ed.), §2373. The cases in which defendant's knowledge of facts and conditions, implied from prior occurrences and conditions, was relied upon as the basis of an action are numerous. *Hopkins v. Boyd* (1897), 18 Ind. App. 63; *City of Goshen v. England* (1889), 119 Ind. 368, 5 L. R. A. 253; *Ramsey v. Rushville, etc., Gravel Road Co.* (1882), 81 Ind. 394; *Cleveland, etc., R. Co. v. Wynant* (1887), 114 Ind. 525, 5 Am. St. 644; *City of LaFayette v. Weaver* (1884), 92 Ind. 477. The evidence being admissible for one purpose there was no error in overruling the objection to it. There are other grounds upon which it was admissible, but in a dissenting opinion it does not seem worth while to elaborate them. See *Evansville, etc., R. Co. v. Keith* (1893), 8 Ind. App. 57; *Grand Trunk R. Co. v. Richardson* (1875), 91 U. S. 454, 23 L. Ed. 356.

I dissent from the decision.

 OHIO FARMERS INSURANCE COMPANY v. HUNTER.

[No. 5,431. Filed May 11, 1906.]

1. **INSURANCE.** — *Return of Policy.—Cancellation.* — *Intent.* — Whether the return of an insurance policy to the company was an exercise of the right of cancellation depends upon the intent with which it was returned. p. 13.
2. **SAME.** — *Return of Policy.* — *Cancellation.—Evidence.* — Where assured returned her policy to the company and demanded her premium notes, saying that would settle the matter, the insurance ceased, there being no room for diverse inferences. p. 14.
3. **SAME.** — *Cancellation.—Enforcement of Premium Note.* — Where assured cancels her insurance, the attempted enforcement of the premium notes, so far as they were earned before cancellation, is not inconsistent with such cancellation. p. 14.

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4. **INSURANCE.—Cancellation.—Assent.**—Where assured is given the right of cancellation in an insurance policy, she may exercise such right regardless of the insurer's assent. p. 14.

From Jefferson Circuit Court; *Hiram Francisco*, Judge.

Action by Diantha Hunter against the Ohio Farmers Insurance Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

Guilford A. Deitch and *P. E. Bear*, for appellant.

L. A. Douglass and *A. D. Vanosdol*, for appellee.

ROBY, C. J.—Action on a policy of fire insurance. The plaintiff had verdict and judgment for \$597.50. The complaint is in two paragraphs. They are not challenged by demurrer, and, while the second paragraph is attacked by assignment of error, no argument in support thereof is made. We do not approve the pleading by inference or otherwise. An answer in three paragraphs was filed, in the second of which it was averred that the policy sued upon contained a provision as follows:

“This policy may be canceled at any time, and if canceled by the insured and the premium has been actually paid in cash the company may retain the customary short rate for the time elapsed from the date of the policy to the time it is received at the office of the company in LeRoy, Ohio, for cancelation.”

It is further averred that the plaintiff did not pay the premium on such policy, but executed her promissory note therefor, due on or before January 1, 1901; that she failed and refused to pay said note at maturity, and failed to pay said premium; that defendant placed said note in the hands of an attorney for collection; that the plaintiff, upon being requested to pay said note, refused to pay the same and returned said policy to defendant for cancelation upon March 13, 1901; that such policy was accepted by defendant and entered upon its books as canceled upon said day. The property is alleged in the complaint to have been destroyed by fire on March 18, 1901. Other paragraphs of

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answer, in view of the conclusion reached, will not be further referred to.

Appellant's motion for a new trial was overruled. It presented the question as to the sufficiency of the evidence to sustain the verdict. The evidence is in the record. The policy sued on contains a clause in terms as set out in the answer. It is established that appellee's husband, C. D. Hunter, acted as her agent throughout the transaction, and, on the date named, in such capacity, wrote the following letter:

"C. D. Hunter, Dry-Goods, Notions and Groceries,
Notary Public. Memphis, Indiana, 3-13-1901.

Jerry Bundy.

Dear Sir. I send you my policy and I want you to send me my notes and this will settle the matter with us. I will give you the \$5 I paid you and you send me the notes. I did not think you took the notes but you did, and you know that was not right.

Yours,

C. D. Hunter.

I have your card telling me to send policies in.

C. D. Hunter,
Memphis, Indiana."

The policy in suit was by him returned. By the provision heretofore quoted the right to cancel the policy was given to appellee. Whether returning the policies

1. to the agent was an exercise of such right depends upon the intent with which they were returned.

Crown Point Iron Co. v. Aetna Ins. Co. (1891), 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147; *Von Wien v. Scottish Union, etc., Ins. Co.* (1889), 118 N. Y. 94, 23 N. E. 123; *Train v. Holland Purchase Ins. Co.* (1875), 62 N. Y. 598; *Birnstein v. Stuyvesant Ins. Co.* (1903), 82 N. Y. Supp. 140; *Ikeller v. Hartford Fire Ins. Co.* (1898), 53 N. Y. Supp. 323.

There does not seem to be any room for diverse inference as to her intent. The terms of the letter left nothing

to implication. The existence of such intent being

2. undisputed, and the policy having been returned in accordance with it, the insurance was at an end.

Insurance Commissioner v. People's Fire Ins. Co. (1894), 68 N. H. 51, 44 Atl. 82; *Stewart v. Knight & Jillson Co.* (1906), 166 Ind. 498.

The assertion of a claim against her upon the premium note is not inconsistent with such cancelation. To the extent that the accrued premium had been earned,

3. appellee was bound to pay. *American Ins. Co. v. Garrett* (1887), 71 Iowa 243, 32 N. W. 356. It

did not lie with appellant, in any event, to curtail or deny to her a right given by the contract. A demand for payment of the premium note could in no event operate to render her liable for any part of the premium, except that earned prior to the cancelation. It is always competent for parties to cancel a contract of insurance by mutual consent, but, where the specific right to cancel is retained by the in-

4. sured, the insurer's assent to such cancelation is not requisite.

In view of these facts, consideration of other questions argued becomes unnecessary.

Judgment reversed, and cause remanded, with instructions to sustain motion for new trial.

Wiley, Comstock, Myers and Robinson, JJ., concur. Black, P. J., absent.

BESSLER v. LAUGHLIN.

[No. 5,632. Filed May 11, 1906.]

APPEAL AND ERROR.—Joint and Several Exceptions.—Erroneous Ruling Precedent.—Transfer.—Where the Appellate Court deems a ruling precedent, holding a certain exception to a ruling joint and that no question can be presented by a several assignment thereon, erroneous, the cause will be transferred to the Supreme Court.

From Ripley Circuit Court; *Willard New*, Judge.

Action by John Laughlin against George Bessler and others. From a judgment for plaintiff, defendant Bessler appeals. (On transfer, see — Ind. —.) *Transferred to Supreme Court.*

Miller, Elam & Fesler, for appellant.

John O. Cravens and *Roberts & Cravens*, for appellee.

PER CURIAM.—The complaint is in three paragraphs. A demurrer was addressed to it in the following language: "Come now the defendants and each severally and separately demurs to each paragraph of the complaint severally and separately, for the reason that neither of said paragraphs state facts sufficient to constitute a cause of action against the defendants or either of them." The ruling of the court upon the demurrer is as follows: "The court, also being fully advised as to the demurrer to each paragraph of complaint herein, overrules the same, to which ruling the defendants except."

In *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460, the Supreme Court said: "There were seven paragraphs of complaint and appellant demurred to each of them. Its demurrer was overruled and it reserved a general exception to the ruling. Although appellant sought on appeal to question severally said ruling as to each of said paragraphs, yet as the exception was in gross we are compelled to hold that such assignments of error present no question for our consideration." The authority of the case cited precludes the consideration of the separate paragraphs of the complaint herein. Two of the judges of the second division of the Appellate Court being of the opinion that the ruling precedent of the Supreme Court in the case of *Southern Ind. R. Co. v. Harrell*, *supra*, is erroneous, for that reason this cause is transferred to the Supreme Court under section ten, subdivision one, of the

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act approved March 12, 1901 (Acts 1901, p. 565, §1337j Burns 1901).

COMSTOCK, J.—I do not concur with my associates in the order of transfer. That part of the opinion in *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460, referred to, only announces a general rule that an exception in gross to a several ruling can not avail as a several exception. The opinion does not set out the language of the exception nor of the ruling, and it does not necessarily apply to the question raised in the case at bar.

AGNEW ET AL. v. AGNEW.

[No. 5,633. Filed May 11, 1906.]

BILLS AND NOTES.—*Extension of Time of Maturity.—Consideration.—Trusts.*—Where the maker of a note drawing eight per cent interest until paid, four days before maturity, assigned his interest in certain trust funds to secure the payment of the principal of such note with interest at seven per cent, authorizing the trustee to pay such note “if the same shall not be paid before a final distribution” of such funds, the payee is entitled before the distribution of such funds to a personal judgment for such principal and eight per cent interest and to a lien on such trust funds for such principal and seven per cent interest, which lien is enforceable at the distribution of such funds, no consideration being shown for the reduction of the rate of interest and no agreement appearing for any definite extension of the time for the payment of such note.

From Pulaski Circuit Court; *T. F. Palmer*, Special Judge.

Suit by Emily Agnew against Joseph B. Agnew and others. From a decree for plaintiff, defendants appeal. *Reversed.*

Henry A. Steis, for appellants.

Burson & Burson, for appellee.

ROBINSON, J.—Suit by appellee upon a promissory note and to have a lien declared against certain trust funds.

The facts found by the court are in substance as follows: On October 14, 1889, Joseph B. Agnew, Jr., executed to appellee his promissory note for \$900, payable five years after date, with eight per cent interest per annum after maturity until paid, and ten per cent attorneys' fees, and at the same time executed as interest notes certain coupon notes, all of which interest notes were paid before the bringing of this action. To secure the payment of the notes Joseph B. Agnew and wife mortgaged to appellee certain lands, which mortgage, on October 15, 1894, was released of record. On December 20, 1887, Joseph B. Agnew, Sr., and wife, parents of appellants Joseph B., Jr., and Daniel Agnew, executed a deed of trust to Daniel Agnew, for the benefit of all their children, to certain lands, and the deed of trust was duly recorded. The deed provided that after the death of the grantors the lands should be sold, and the proceeds of the sale should be divided equally between the beneficiaries, taking into account advancements made to certain of the children, the proceeds of "any of the land sold to be loaned and secured by mortgage, and the interest derived therefrom with all incomes from rents and profits, after the payment of taxes and other expenses, to be paid to the grantors, or used for their exclusive benefit." The trustee accepted the trust and proceeded to carry it into effect. On October 10, 1894, appellant Joseph B. Agnew, Jr., executed to appellee the following:

"In consideration of the release and satisfaction of a mortgage executed by Joseph B. Agnew, Jr., and Allie Agnew, his wife, to Emily Agnew, October 14, 1889, to secure the payment of a \$900 note, principal and interest notes, which mortgage appears of record in the recorder's office of Pulaski county, Indiana, in book T, at page 250, I hereby assign to Emily Agnew a sufficient sum of money now due me or which may hereafter be due me from the proceeds of the sale of lands derived from my father and mother to pay said prin-

cipal note and the interest thereon at the rate of seven per cent payable annually, and I hereby authorize Daniel Agnew, trustee for the children of Joseph B. Agnew, Sr., and Louisa M. Agnew, to retain from my share of the money held by him a sufficient sum to pay said note if the same shall not be paid before final distribution of the money held by him for said children."

This assignment was accepted by appellee, whereupon she executed the release of the mortgage. The note of \$900 has been retained by appellee since its execution, and is now in her possession. The note is due and unpaid. The trustee has in his hands \$1,133.50, as the share of appellant Joseph B. Agnew, Jr. There has been no extension of the time of payment of the note, and no payments have been made thereon.

The court concludes the law to be: "That there is now due the plaintiff from the defendant Joseph B. Agnew, Jr., and that the same is unpaid, for principal and interest, the sum of \$1,572, and for attorneys' fees, made by the plaintiff in this behalf, \$90, and that said amount, principal, interest, and attorneys' fees—to wit, \$1,662—is a lien upon any sum of money that is now due or may hereafter become due said Joseph B. Agnew, Jr., from the proceeds of the sale of lands derived from his father or mother, Joseph B. Agnew, Sr., and Louisa M. Agnew, when the same shall become available, to wit, after the death of said Louisa M. Agnew, provided, the judgment rendered by this court upon these findings and conclusions of law shall not be paid before said funds become available."

The determination of the questions argued by appellants' counsel depends upon the construction to be given the assignment executed by appellant Joseph B. Agnew, Jr., to appellee. It is insisted by counsel that this instrument, executed October 10, 1894, extended the time of payment of the note until the death of the father and mother, who executed the trust deed, at which time a distribution of the proceeds of the land should be made. The assignment was

executed October 10, 1894. The note was due four days thereafter and the interest had been paid up to that date. The note expressly provided that it should draw interest at the rate of eight per cent per annum after maturity until paid. The written assignment furnishes some evidence that the interest on the note from that date should be seven per cent. But the note itself was permitted to stand as originally executed. The note would mature in four days thereafter and the interest had already been paid to maturity. If there was an intention to change the rate of interest the change manifestly was not to be effective at the date of the assignment; that is, it can not be said that the parties intended the note should draw interest at the rate of seven per cent from the date of the assignment, because the interest was already paid to maturity. Neither was the time of payment of the note extended for any particular time, nor for any time. The assignment contemplated that the trustee might hold money belonging to the assignor before the final distribution directed in the deed of trust, in which event the trustee was directed to retain from the assignor's share a sufficient sum to pay the note and seven per cent interest, if the same had not been previously paid, and the court finds as a fact that the trustee had in his hands as such trustee \$1,133.50 as the share of the assignor. There was no agreement between the maker and payee of the note to forbear suit on the note for any fixed time, and it was manifestly the intention of the parties to treat the note as an overdue note, which might be paid by the maker at any time before distribution, or at the time of the distribution, but until it was paid the interest of the maker in the trust estate should stand as security for its payment. It is true, appellee released her mortgage security, but in the absence of any showing we can not presume that the new security was any better than the old. It is also true that an agreement to pay interest is a sufficient consideration for the extension of time of payment of a note; but the

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note was, without any new agreement, drawing eight per cent interest.

Under the findings appellee was entitled to a judgment on the note with interest at eight per cent. However, she is not entitled to a decree that the judgment for this amount is a lien on the trust funds, for the reason that appellants assigned only so much of the fund in the hands of the trustee as would be sufficient to pay the principal of the note and seven per cent interest thereon. The judgment against appellants for the face of the note with eight per cent interest is right, but the lien on the trust fund should be only for the face of the note and interest thereon at seven per cent per annum from the time of the maturity of the note to the date of the rendition of the judgment.

Judgment reversed, with instructions to restate the conclusion of law.

DIAMOND PLATE GLASS COMPANY ET AL. v.
KNOTE ET AL.

[No. 5,581. Filed May 11, 1906.]

1. LANDLORD AND TENANT.—*Leases.—Gas.—Forfeiture.—Election.*—A gas lease by which the lessee is given the right to explore lessor's lands, such lease to terminate whenever "gas ceases to be used generally for manufacturing purposes" or whenever the lessee shall fail to pay the rental price within sixty days after it becomes due, terminates when gas ceases generally to be used for manufacturing purposes, and does not terminate by the mere fact of nonpayment, but such fact gives the lessor the right to forfeit such lease. *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, followed. p. 21.
2. APPEAL AND ERROR.—*Stare Decisis.*—Where valuable property rights are founded upon the rules of law laid down by the courts of last resort, such rights will be protected by the doctrine of *stare decisis*. p. 25.
3. SAME.—*Stare Decisis.—Supreme Court.—Appellate Court.—Conflict.*—Where a gas lease was entered into prior to a decision of the Appellate Court and the lessee tried to terminate such

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lease according to such decision, but the Supreme Court decided that such lease could not be so determined, the lessee is in no position to invoke the rule of *stare decisis*, no rights being contracted on the ground of such decision. p. 26.

From Grant Superior Court; *B. F. Harness*, Judge.

Action by John A. Knote and another against the Diamond Plate Glass Company and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Blackledge, Shirley & Wolf and *Bell & Purdum*, for appellants.

B. C. Moon, for appellees.

MYERS, J.—Appellees recovered judgment in the court below against appellants for \$190.75, on account of what is designated in a certain contract as an “annual rental” until a gas-well is drilled on the real estate described in such contract, and also for a failure to furnish gas, as by such contract provided.

The contract in this case is identical with, and the complaint is practically the same as, the contract and complaint in the case of *Hancock v. Diamond Plate Glass Co.*

1. (1904), 162 Ind. 146, except as to the names of the landowners, the date of the contract, the amount of annual rental and time payable, and, upon the authority of that case, the first two errors here assigned, namely, that the complaint does not state facts sufficient to constitute a cause of action, and that the complaint does not state facts sufficient to withstand a demurrer, must be ruled against appellants.

The third error is that the court erred in its conclusion of law, and the fourth, that the court erred in overruling appellants’ motion for a new trial. By these two assignments two questions are presented, the determination of which will be decisive of this case.

(1) When, under the facts as found by the court, did the contract in suit terminate? Appellants insist it terminated when they refused to pay rent January 1, 1896, or

when the gas company made a formal surrender and cancellation of the contract in February, 1900. The court upon request made special findings, and so far as they are material to the question now under consideration, after setting out a copy of the contract in suit, they show written assignments thereof from the Diamond Plate Glass Company to the Pittsburg Plate Glass Company, and from the Pittsburg Plate Glass Company to the Logansport & Wabash Valley Gas Company. By such assignments each assignee agreed to perform all the terms and conditions of said contract and pay all rentals thereafter maturing under the same, and said assignments embraced a transfer of the pipes from which appellees were being furnished gas under said contract. The pipes from which appellees received gas were laid and maintained upon the highway along appellees' land. No gas or oil well was ever drilled or put down at any time upon the land described in the contract, nor did either or any of the appellants ever offer or attempt to put down any oil or gas well, although the owners of said real estate were at all times ready and willing for such a well to be drilled or put down by any holder thereof. Since the execution of the contract gas was used generally for manufacturing purposes until in the spring of 1902, when it ceased to be so used. The owners of said real estate at all times performed all the conditions of said contract on their part. The holders of the contract furnished the owners of said real estate natural gas free of charge for domestic use for the dwelling-house on said premises until November 25, 1901, when the Logansport & Wabash Valley Gas Company cut off the supply of gas, and ever since that time each of appellants has failed and refused to furnish natural gas for said dwelling-house, and that gas necessary for the domestic use of appellees, from the date when cut off to the date when it ceased to be used for manufacturing purposes, was reasonably worth \$15. All rentals due for the several years up to and including payment due January 1, 1895, were

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duly paid. The rent due January 1, 1896, was not paid when the same became due. On February 24, 1896, a suit was begun before a justice of the peace of Howard county, Indiana, against the Diamond Plate Glass Company and the Pittsburg Plate Glass Company to recover \$30, the sum then due on account of said contract, and such proceedings were had before said justice as resulted in a judgment in favor of appellees in the sum of \$30. From this judgment the parties defendant in that action duly appealed to the Howard Circuit Court, and thereafter said cause was venued to the Tipton Circuit Court, where the case was again tried, and on December 17, 1896, judgment was rendered in favor of appellees against the two glass companies, which judgment was thereafter paid, as was also the rent due January 1, 1897, by the Logansport & Wabash Valley Gas Company, one of the appellants herein. The rent due January 1, 1898, 1899, 1900 and 1901, and for part of a year—\$10—due January 1, 1902, with interest from the date when due, is unpaid. On January 6, 1900, the appellant gas company signed, and on January 22, 1900, acknowledged before a notary public, and on February 5, 1900, placed on record in the office of the recorder of Howard county, in release and assignment record No. 5, page 25, a writing reciting the assignment to it of said contract, and that the same had been abandoned by said gas company and all rights thereunder relinquished, and that the same was released, and "that the parties owning said real estate were placed in the same situation with respect to said lands that they would have been or would be had said leases never been executed," and "that the owners of said land refused to accept said cancelation of said lease so filed, and said cancelation was so attempted to be made without the knowledge or consent of the owners of said land." The amount due appellees, with interest, on July 9, 1904, was \$190.75.

From these findings the court concluded as a matter of law that appellees should recover in this action, and entered judgment accordingly for \$190.75, and costs of the action.

Practically the same state of facts was before our Supreme Court in the case of *Hancock v. Diamond Plate Glass Co.*, *supra*, and by reference to the opinion of the court in that case it will be observed that each insistence of appellants, as above stated, is there thoroughly discussed and decided against their present contention. In that case, under the averments of the complaint, the court held the contract to be in full force and effect. In this case, the findings show a termination of the contract by limitation. Gas ceased to be used generally for manufacturing purposes in the spring of 1902, and, this being true, the contract by its express terms terminated at that time.

(2) Appellants' second ground of defense to this action is based upon the rule of *stare decisis*.

In *Diamond Plate Glass Co. v. Curless* (1899), 22 Ind. App. 346, and in *Diamond Plate Glass Co. v. Echelbarger* (1900), 24 Ind. App. 124, this court, in construing a contract substantially like the one now before us, declared that it was an agreement which ran only from year to year, "and that at the end of any year either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay, the stipulated sum." As to these cases, at the time they were decided, this court had final jurisdiction. It placed a construction upon the contracts then before it, which, as we have said, were substantially like the one now under consideration. Appellants now claim they had a right to rely upon that construction, and the law as declared in those decisions. They did so, and declined to pay the annual rental due January 1, 1900. By their written release, duly recorded, they reinstated appellees in their full rights in the land, freed from any claims thereafter by virtue of such contract, and are there-

fore entitled to be relieved from any liability to pay rentals after such attempted cancelation.

If we were to follow the cases of *Diamond Plate Glass Co. v. Curless, supra*, and *Diamond Plate Glass Co. v. Echelbarger, supra*, a reversal or remittitur should

2. be ordered, for, as we have seen, the judgment includes rentals falling due after appellants made the aforesaid attempt to terminate the contract. There is no rule known to the law more eminently just or productive of greater good as tending to enforce stability and establish uniformity in our laws than that of *stare decisis*. It is a rule to preserve the law as settled by the decisions of a court having final jurisdiction of the questions involved. *Menge v. The Madrid* (1889), 40 Fed. 677; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* (1899), 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. 17; *Palmer v. Mead* (1828), 7 Conn. 149.

In short, *stare decisis* means to follow precedent, and is founded upon the broad principle that the law governing commercial transactions and affecting property rights should remain settled, and not be subject to flexible and restless precepts. Courts ought not and will not disturb contractual relations or valuable rights resting upon the strength of decisions by courts of last resort, but will adhere to the maxim *stare decisis*, when necessary for their protection and enforcement, where the facts are substantially the same as those upon which the former decisions were grounded, "except from the most urgent consideration of public policy." *Hines v. Driver* (1883), 89 Ind. 339; *Pond v. Irwin* (1888), 113 Ind. 243; *City of Cincinnati v. Taft* (1900), 63 Ohio St. 141, 151, 58 N. E. 63; *American Mortgage Co. v. Hopper* (1894), 64 Fed. 553, 12 C. C. A. 293; *Moore v. City of Albany* (1885), 98 N. Y. 396; *Treon v. Brown* (1846), 14 Ohio 482; *Kearny v. Buttles* (1853), 1 Ohio St. 362.

Applying these observations to existing conditions, both as to the law as it now stands (*Hancock v. Diamond Plate Glass Co.*, *supra*), and the facts as here found, or

3. to be inferred from the evidence liberally construed in appellants' favor, leads us to the conclusion that the rule of *stare decisis* ought not in this case to be invoked, for the reason that courts in the same jurisdiction ought never to enforce a rule of law which has been disapproved by the court of last resort, although announced by a court, at the time, of equal jurisdiction, unless such refusal would amount to a trap into which parties have been thereby induced to enter to their irreparable injury. *City of Cincinnati v. Taft, supra*.

In the case now under consideration, we find no such extraordinary influences. There is no finding or evidence tending to support any new arrangement between the parties to the contract or their assignees, or rights having vested upon the faith of *Diamond Plate Glass Co. v. Curless, supra*, and *Diamond Plate Glass Co. v. Echelbarger, supra*. True, without the consent of the landowners, the gas company endeavored to free itself from the covenant in the contract to make annual payments, but in a manner or by a proceeding which our Supreme Court has said was not sufficient for that purpose. The claim is that it gave up valuable rights on the faith of such decisions. It is certain the landowners were objecting to a cancelation of the contract, and whatever was done along this line was a voluntary act upon the part of one of the parties to it. The findings are silent, likewise the evidence, on the question of such "valuable rights." The land was unexplored, and natural gas, at that time, had not ceased to be used generally for manufacturing purposes. By the very terms of the contract, until the drilling of a gas-well on the land, or until natural gas ceased to be used generally for manufacturing purposes, appellants agreed to pay \$30 annually on January 1 of each year.

As we view this case, appellants are now seeking to escape liability imposed by a covenant in the contract, through the medium of decisions made long after the obligation was assumed. By cutting off this avenue of escape we are unable to see where, in this particular case, we are adding additional burdens, or in the least interfering with contractual relations.

We find no cause for reversal. Judgment affirmed.

DAGGY ET AL. v. WELLS ET AL.

[No. 5,383. Filed December 14, 1905. Rehearing denied February 21, 1906. Transfer denied May 11, 1906.]

1. DESCENT AND DISTRIBUTION.—*Illegitimate Children.—Evidence.—Acknowledgment.—Statutes.*—An acknowledgment, prior to the taking effect of the act of 1901 (Acts 1901, p. 288, §2630a Burns 1901), of the paternity of an illegitimate child, is sufficient to enable such child to inherit under such statute. *Townsend v. Meneley*, 37 Ind. App. 127, followed. p. 28.
2. TRIAL.—*Instructions.—Defining "Acknowledgment."*—*Invasion of Province of Jury.—Descent and Distribution.*—The court has the right to instruct the jury as to what constitutes an "acknowledgment" of an illegitimate child, as provided by the act of 1901 (Acts 1901, p. 288, §2630a Burns 1901) providing that such child may, under certain conditions, inherit from the father. p. 29.
3. APPEAL AND ERROR.—*Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence. p. 30.

From Jackson Circuit Court; *William T. Branaman*, Special Judge.

Suit by Rebecca A. Daggy and others against Lilly Wells and another. From a decree for defendants, plaintiffs appeal. *Affirmed.*

S. B. Lowe, Brooks & Brooks and *James F. Applewhite*, for appellants.

Russell B. Harrison, J. E. Boruff, Frank Branaman and *John C. Branaman*, for appellees.

WILEY, J.—Suit by appellants to quiet title to real estate. Appellees filed an answer in denial, and also filed a cross-complaint, asking that the title to the same real estate be quieted in them. To the cross-complaint appellants filed a denial. Trial by jury, resulting in a general verdict for appellees. With the general verdict the jury answered interrogatories submitted to them by the court. Appellants moved for judgment on the answers to interrogatories and also for a new trial, and these motions were overruled, and such rulings are assigned as errors.

Appellee Milton D. Wells is the husband of his co-appellee, and was made a party for that reason. Appellant Rebecca A. Daggy is the mother of Thomas O. Daggy, deceased, and the other appellants are his sisters. Appellee Lilly is his illegitimate child, and all the parties to this suit claim title to the real estate by virtue of descent from said Thomas O. Daggy, who was never married.

The controlling question presented by the record is identical to that involved and decided in the case of *Townsend v. Meneley* (1906), 37 Ind. App. 127, to wit: The

1. right of an illegitimate child to inherit from its putative father under the provisions of §2630a Burns 1901, Acts 1901, p. 288, where such father during his lifetime has acknowledged such child as his own. The exact point of contention here, as in the case cited, is whether the statute is effective and vests the title to real estate in such illegitimate child, if the acknowledgment of its paternity antedated the enactment of the statute. In that case we held that where the only acknowledgment of an illegitimate child by its father was prior to the date the statute took effect, it was, notwithstanding, sufficient to entitle such child to inherit thereunder. We still adhere to that decision and think the question was correctly determined. In this case, it affirmatively appears by an answer to an interrogatory that appellee's father never acknowledged her to be his child after the passage of the

amendatory act of 1901 (§2630a, *supra*), and it is upon this ground that appellants contend they are entitled to judgment on the answers to the interrogatories, notwithstanding the general verdict. Following the rule declared in the case of *Townsend v. Meneley, supra*, we hold that the motion for judgment was correctly overruled.

In a number of instructions, to which reference is made in argument, the same question is presented. After a careful consideration of all of the instructions, relating to this particular question, we have reached the conclusion that the court did not err in giving or in refusing to give the instructions of which complaint is made.

It is also urged by counsel for appellant that the court erred by invading the province of the jury "in telling them what it took to constitute acknowledgment." We

2. think it was within the province of the court to tell the jury, by its instructions, what words, acts, etc., would constitute an acknowledgment on the part of the father whether he was the father of such illegitimate child, within the meaning of the statute. The only requirement of the statute, to entitle such illegitimate child to inherit, is that the father "shall have acknowledged such child * * * as his own during his lifetime." What will constitute such acknowledgment is both a question of fact and law, and the instructions relating thereto in this case correctly stated the law.

The court gave and also refused to give a very large number of instructions. We have examined all of these with care, and have reached the conclusion that no reversible error was committed by the court in giving or refusing to give them.

Appellants also predicate error in the admission of certain evidence. Most of this evidence refers to the question of acknowledgment prior to the taking effect of the act of 1901, *supra*. For the reasons above stated, there was no error in the admission of this evidence. Other objections

are urged to the admission of evidence, but are not supported by argument.

It is lastly contended that the verdict is not sustained by sufficient evidence, in that the evidence on the question of acknowledgment "would fall far short of making a

3. case, even if the statute were retroactive." Without referring to or setting out the evidence, it is sufficient to say that there is an abundance of evidence in the record to support the general finding of the jury and the special finding, as disclosed by an answer to an interrogatory, that Thomas O. Daggy did during his lifetime acknowledge appellee Lilly as his own child. This being true, and having brought herself within all of the requirements of the statute, as disclosed by the evidence, she is entitled to inherit from her putative father, and the real estate of which he died seized immediately upon his death vested in her.

Judgment affirmed.

BOARD OF COMMISSIONERS OF THE COUNTY OF HENDRICKS v. EATON.

[No. 5,691. Filed May 15, 1906.]

1. OFFICERS.—*Sheriffs.—Fees and Salaries.—Court Attendance.*—The per diem allowances to sheriffs, paid to the county as a part of the "fees" of the office, may be recovered by such sheriffs. *Board, etc., v. Crone* (1906), 36 Ind. App. 283, followed. p. 32.
2. APPEAL AND ERROR.—*Insufficient Evidence.—Rule.*—Where a finding is attacked, on appeal, for insufficiency of evidence, the court will consider only the evidence tending to sustain such finding. p. 32.
3. COUNTIES.—*Allowance of Claims.—Failure to Present.—Defense.—Evidence.*—In an action against a county the claimant's failure to present his claim to the board of commissioners is a defense which must be pleaded and proved, and where not pleaded evidence in support of such contention is not admissible. p. 32.

Board, etc., v. Eaton—38 Ind. App. 30.

4. **APPEAL AND ERROR.—Evidence.—Admission.—Joint Assignment.**—Where error is assigned upon the admission in evidence of exhibits one to nine, inclusive, if one was properly admitted, such error is not well taken. p. 32.
5. **EVIDENCE.—Counties.—Officers.—Reports.—Fees.**—The reports to the board of commissioners of fees collected by a sheriff, which fees are charged on such sheriff's salary account, are admissible in evidence on behalf of such sheriff in an action against such county for the recovery of certain fees therein included. p. 33.
6. **APPEAL AND ERROR.—Evidence.—Proof of a Fact Admitted.**—It is not harmful to admit evidence to prove a fact the truth of which is already admitted by the other party. p. 33.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Henry I. Eaton against the Board of Commissioners of the County of Hendricks. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Brill & Harvey, for appellant.

Solon A. Enloe, for appellee.

COMSTOCK, J.—Appellee, who was plaintiff below, was duly elected sheriff of Hendricks county, Indiana, at the general election, held on November 8, 1898, for the regular term of two years. He duly qualified by filing his official bond, and assumed the oath of office November 23, 1898, and continued in the discharge of his official duties as such sheriff until November 23, 1900. While acting as such sheriff the appellee received from time to time out of the county treasury of said county, upon allowances in that behalf, \$972, for his per diem attendance on the circuit court and the commissioners' court of said county, and reported the same in his quarterly reports filed with the auditor of said county, and turned said sums of money into the county treasury, and the same, together with all of his "fees," were credited as a part of the salary allowed him. He sued the appellant to recover the sum so allowed. There was a trial, and the court, upon request, made a special finding of the facts and stated conclusions of law thereon

in favor of appellee, and rendered judgment for \$972, the full amount demanded.

The errors assigned challenge the sufficiency of the complaint and the action of the court in overruling appellant's motion for a new trial.

This case presents, in all essentials, the same

1. questions as were involved in *Board, etc., v. Crone* (1906), 36 Ind. App. 283, except those arising upon the motion for a new trial.

One of the reasons discussed for a new trial is that there is not sufficient evidence to sustain special finding number seven. That finding is as follows: "That prior to

2. the bringing of this suit the plaintiff filed with the Board of Commissioners of the County of Hendricks his claim, in proper form, for the return of said sum of \$972, but said board refused to allow said claim, and rejected the same, and said money has not been paid to the plaintiff." In determining whether a special finding is sustained by sufficient evidence, it is only necessary to consider such evidence as tends to sustain the finding, disregarding any evidence to the contrary, for the reason that if there is evidence sustaining the same, even though there may be evidence to the contrary, we cannot weigh it or determine the credibility of the witnesses. *Robinson & Co. v. Hathaway* (1898), 150 Ind. 679.

There was evidence fairly tending to sustain said finding, but if the claim was not so presented it was a matter of defense. This defense was not pleaded. *Board,*

3. *etc., v. Tichenor* (1891), 129 Ind. 562; *Bass Foundry, etc., Works v. Board, etc.* (1888), 115 Ind. 234.

The next reason for a new trial is in admitting in evidence the exhibits one to nine, inclusive, over the objection of the defendant, for the reason that said exhibits

4. and each of them were self-serving declarations that were not properly sworn to as provided by law.

This reason is joint and it must be good as to each and all of said exhibits or it fails. Exhibit number two was received and acted upon by the defendant, and the amount therein reported as having been received by the plaintiff was, by the auditor of Hendricks county, charged against the plaintiff on account of his salary as sheriff. All but

one of said exhibits are signed by appellee, and all

5. but four are signed and sworn to. Appellant's objection to all of the exhibits, that they were merely self-serving declarations, cannot be maintained, because they are acknowledgments of money received by him.

Counsel for appellant, in the statement of the case, say, that while appellee was acting as sheriff he received from time to time out of the county treasury of said

6. county, upon allowances in that behalf, \$972 for his per diem attendance on the circuit court and the commissioners' court of said county, and reported the same in his quarterly reports filed with the auditor of said county, and that he voluntarily paid said sums into the county treasury, and the same were credited as a part of the salary allowed him by law. This may fairly be considered as an admission of the facts which the exhibits were introduced to prove.

The court did not err in overruling the motion for a new trial, and as to the other alleged errors the judgment is affirmed upon the authority of *Board, etc., v. Crone, supra*.

MEFFORD v. LAMKIN, ADMINISTRATOR.

[No. 5,597. Filed February 21, 1906. Rehearing denied May 15, 1906.]

1. DECEDENTS' ESTATES.—*Executors and Administrators.—Final Settlement.*—The filing of a final report and the giving of notice thereof confer jurisdiction upon the court to hear and determine the matters involved in such report. p. 35.

Mefford v. Lamkin—38 Ind. App. 33.

2. **DECEDENTS' ESTATES.—Distribution.**—A judgment approving an administrator's final report is conclusive so long as it stands, and it is immaterial whether the administrator distributes the money directly or procures an order to pay it to the clerk for designated persons, such order being a part of the final settlement. p. 35.
3. **SAME.—Final Settlement.—Setting Aside.—Conversion.**—A final settlement, based upon an administrator's final report showing that such administrator and another were the only heirs, when in fact they were not heirs but another party was the only heir, will be set aside whether distribution was made directly by such administrator or whether an order was procured to pay the funds to the clerk and for such clerk to pay to such persons, whether such money was converted or is still in the hands of the clerk being immaterial. pp. 36, 37.
4. **SAME.—Administration.—What Is.**—Administration upon the estate of a decedent imports a reduction of such decedent's estate to money, the payment of his debts and a distribution of the proceeds to those legally entitled thereto. p. 36.

From Johnson Circuit Court; *E. A. McAlpin*, Special Judge.

Suit by James D. Mefford against David Lamkin, as administrator of the estate of Martha J. Handy, deceased. From a decree for defendant, plaintiff appeals. *Reversed.*

William Featherngill, for appellant.

Miller & Barnett, for appellee.

ROBY, C. J.—Suit by appellant to set aside final settlement of an estate under the provisions of §2558 Burns 1901, §2403 R. S. 1881. It is averred in the complaint that appellant was the sole heir of Martha J. Handy, who departed life March 30, 1900, intestate; that appellee, Lamkin, was appointed administrator of her estate, qualifying and entering upon the discharge of said trust; that on November 8, 1901, he filed his verified final report, by which it was shown that he held for distribution the sum of \$475.13, and that he himself and David Devar were the only heirs at law of said decedent; that he took and converted said sum to his own use and that of said Devar; that

on December 11, 1901, the court heard and approved said final report; that appellant was not summoned or notified to appear at the hearing, and did not appear thereat, and had no knowledge thereof. The issue was formed by a general denial. Trial and finding for defendant. Motion for new trial overruled, and judgment on the finding.

When the administrator filed his final report showing the balance for distribution, and notice thereof was given in accordance with the statute, the court thereby ac-

1. quired jurisdiction over the matter of the distribution of such surplus as an incident to final settlement. *Jones v. Jones* (1888), 115 Ind. 504, 510; *Sherwood v. Thomasson* (1890), 124 Ind. 541; §2561 Burns 1901, §2405 R. S. 1881.

Upon statements contained in said report, the administrator procured a judgment which is conclusive, so long as it remains in force. Its effect is the same whether

2. the fund be retained by the administrator and paid out by him, or paid by him to the clerk, as was done in *Jones v. Jones*, *supra*, and in the case at bar. The term "final settlement" comprehends a payment of the balance so as to leave nothing to be done to complete the trust. *Dufour v. Dufour* (1867), 28 Ind. 421. When the case last cited was decided, there was no statute authorizing the payment of moneys into court for distribution, as there is at present. §2557 Burns 1901, Acts 1883, p. 151. The order of distribution is, however, as much a part of the final settlement, where the fund is in the hands of the clerk, as where it is retained by the administrator. In either event the judgment is conclusive against collateral attack and a bar to recovery of a distributive share by an heir omitted therefrom. *Carver v. Lewis* (1886), 105 Ind. 44.

No substantial basis for the finding and judgment of the court is given. "The hearing of claims to the surplus of an

estate is usually very summary and informal.” *Jones*

3. v. *Jones, supra*. It was clearly enough proved—admitted indeed—that appellees had no legal claim to the surplus, and that the statements relative thereto contained in the verified final report were unwarranted. Whether the administrator divided the money between himself and Devar, or procured such division to be made by the clerk, is immaterial. The conversion is equally complete in either event, and for it he is in either event equally responsible.

Judgment reversed, and cause remanded, with instructions to sustain appellant’s motion for a new trial, and for further proceedings not inconsistent herewith.

ON PETITION FOR REHEARING.

ROBY, C. J.—An administrator is a person appointed to manage and distribute the estate of an intestate, or of a decedent who has no executor. 1 Bouvier’s Law

4. Dict., title “Administrator.” The administrator must distribute the residue of the estate among those entitled to it under the direction of the court and according to law. Administration of estates implies such a complete disposition of them as not only to collect assets from the debtors, but to place them in the hands of the creditor, legatee, or distributee to whom, after undergoing the process of administration, they finally belong. *Walton v. Walton* (1864), 4 Abb. Dec. 512, 518; *Martin v. Ellerbe* (1881), 70 Ala. 326; 1 Bouvier’s Law Dict., *supra*.

“In the sense of the statute, and in the sense in which the terms are generally used, the distribution of an estate has reference to the personal property and money arising from the sale of real estate by the administrator, among the heirs, after the payment of the debts and legacies.” *Beard v. Lofton* (1885), 102 Ind. 408, 412; *Dufour v. Dufour* (1867), 28 Ind. 421.

“The filing of his final account by Stewart conferred upon the Montgomery Circuit Court jurisdiction to hear

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and determine all matters pertaining or incidental to the final settlement of the estate. * * * No subsequent petition or pleading was necessary to give the court jurisdiction of the matter of the distribution of the surplus. The jurisdiction over that subject resulted as an incident to the final settlement, and the hearing of claims to the surplus of an estate is usually a very summary and informal proceeding." *Jones v. Jones* (1888), 115 Ind. 504.

The statements contained in the report were therefore germane to the final settlement as made by the administrator, for the advisement of the court and relative

3. to the matter involved in the administration of the estate and the final settlement. Whether the fund for distribution was paid to the clerk or distributed by the administrator, or is still in the possession of the administrator, is, so far as the integrity of the order for distribution is concerned, entirely immaterial. The statute authorizing the payment of money due to the clerk was enacted for the convenience and security of the administrator, and he cannot, by virtue of its provisions, relieve himself from the obligation imposed by the acceptance of his trust.

The foregoing propositions dispose of the points made for rehearing, and the petition is overruled.

SIEBE ET AL. v. HEILMAN MACHINE WORKS.

[No. 5,615. Filed March 14, 1906. Rehearing denied May 15, 1906.]

1. TRIAL.—*Counterclaim.*—*Refusal of Permission to File.*—*Abuse of Discretion.*—It is not an abuse of discretion for the trial court to refuse to permit, when a cause is ready for trial, the filing of a counterclaim where a demurrer had just been sustained to one substantially the same. p. 38.
2. EVIDENCE.—*Warranty.*—*Breach.*—*Notice.*—*Waiver.*—*Receipt.*—*Question for Jury.*—Where defendant testifies that he properly mailed a notice of defects to plaintiff and plaintiff denies receiving such notice, the question of the receipt of such notice is for the jury. p. 41.

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3. **SALES.**—*Warranty—Notice.—Waiver.*—Where property is sold on a warranty which requires a specified kind of notice within a given time that it fails to fulfil the warranty, any notice received by the grantor and acted upon by him is a waiver of the notice required by the warranty. p. 41.
4. **EVIDENCE.**—*Inferences.—Question for Jury.*—It is not necessary to establish a fact that the evidence shall be direct, but inferences may be properly drawn from other proved facts to establish the fact in question, whether such fact is established being primarily a question for the jury. p. 42.
5. **TRIAL.**—*Instructions.—Directing Verdict.—Invasion of Province of Jury.*—Where the determination of an issue involves the credibility of witnesses and rests upon inferences to be drawn from facts proved, it is an invasion of the province of the jury to direct a verdict in favor of the party upon whom rests the burden. p. 42.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by the Heilman Machine Works against Louis F. Siebe and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

W. E. Cox, Leo H. Fisher, R. W. Armstrong and C. F. Coffin, for appellants.

Philip W. Frey, for appellee.

WILEY, J.—Action by appellee against appellants upon two promissory notes given for the purchase of a traction-engine. Appellants answered by pleading facts upon which an allegation of breach of warranty was based, and the waiver by appellee of a certain notice provided for in the warranty. Trial by jury, resulting in a verdict for appellee directed by a peremptory instruction. Appellants' motion for a new trial was overruled and judgment pronounced upon the verdict.

A number of errors are assigned, but we will consider only those to which our attention has been called in the briefs.

After the cause had been put at issue and was ready for trial, the court below permitted appellee to withdraw its general denial to appellants' cross-complaint, or

1. counterclaim, and also permitted it to file for the first time a demurrer to such counterclaim, which

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was sustained, and refused to allow appellants to file any amended counterclaim.

The first question discussed is the refusal of the trial court to permit appellants to file their amended counterclaim, and it is urged that in such refusal there was an abuse of judicial discretion. It is the rule, long established in this State, that the statute which allows amendments of pleadings is to be liberally construed, and to that end the trial court is endowed with great discretionary power, and its action will not be ground for reversal unless it shall affirmatively appear to the appellate tribunal that harm to the complaining party has resulted therefrom. *Blair v. Porter* (1895), 12 Ind. App. 296; *Keck v. State, ex rel.* (1895), 12 Ind. App. 119; *Burnett v. Milnes* (1897), 148 Ind. 230. The answer, or counterclaim, to which a demurrer was addressed and sustained is in the record, as is likewise the amended counterclaim which appellants offered to file, but were not permitted by the court to file. We have examined and compared these two pleadings and are unable to distinguish any material difference in them. The same evidence that would have been admissible under the facts pleaded in the tendered answer would have been admissible under the one to which a demurrer was sustained. If the court had permitted appellants to file their amended counterclaim, or answer, it would have been inconsistent with its ruling in sustaining the demurrer to the original pleading, for in their legal effect the two pleadings were identical. If the original counterclaim was vulnerable to an attack of a demurrer (and as to this we express no opinion), the offered pleading was likewise defective. On the other hand, if the original pleading was good as against a demurrer (and as to this we express no opinion), the offered pleading was also good. It follows, therefore, that if appellants were entitled to any benefits accruing to them under the facts pleaded, they could have secured their rights by excepting to the ruling sustaining the demurrer and standing upon such ruling.

Under the rule above stated, relating to the discretionary power of the trial court, we have no hesitancy in declaring that it does not affirmatively appear from the record that any harm came to appellants by the refusal of the court to permit them to file their amended counterclaim. This being true, the court did not abuse its discretion.

Counsel for appellants next direct their argument to the action of the trial court in directing the jury, by written instruction, to return a verdict for appellee. The engine for which the notes in suit were given was sold by appellee to appellant Louis F. Siebe (Christian F. Siebe being a surety), upon a printed or written warranty. Appellants based their defense upon a breach of the terms of this warranty, and also a waiver. One of the conditions of the warranty was:

“If inside of six days from the day of its first use it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser—Siebe—to the Heilman Machine Works, at its home office, Evansville, Indiana, by registered letter, stating particularly what parts and wherein it fails to fill the warranty, and a reasonable time allowed the company to get to the machine with skilled workmen and remedy the defects, if any there may be.”

The contract further provides:

“Failure to render friendly assistance and coöperation, or keeping the machinery after the six days allowed as above provided, * * * shall be a waiver of the warranty and a full release of the warrantor, without in any way affecting the liability of the purchaser for the price of the machinery or notes given therefor.”

There were other conditions in the warranty relating to notice, but which we need not here specify. It affirmatively appears from the record that appellee did receive from appellants some kind of notice that the engine for which the notes were given was defective in many respects, and did not do the work that it was warranted to do. It is also in the record, without dispute, that appellee acted upon

the notice, sent its experts to make repairs, furnished to appellants certain parts of the engine which had broken, or had gotten out of repair, and made promises, both in writing and orally, that it would make the engine work as warranted, or send to appellants a new one. Under all the evidence in the case, and the issues, the question is fairly presented whether appellee waived that provision in the warranty relating to notice of defects, etc., within a period of six days, by registered letter, etc., as indicated by the above quotation from the warranty.

The record discloses that appellant Louis F. Siebe, within three days after he received the engine, discovered defects in it; that certain parts of the machinery

2. broke; that one of the axles bent, etc.; and that within that time he wrote a letter to appellee calling its attention to such defects, etc., placed the letter in an envelope addressed to appellee at Evansville, put a stamp upon it, and delivered the letter, thus addressed, to the United States post-office at Stendale. Appellee denied that it received such notice. This conflicting evidence tendered an issue of fact for the jury to determine. It is not contended that this letter was sent by registered mail, but the fact that it was written, properly stamped and mailed, if in fact it was, was *prima facie* evidence of its receipt by appellee. 1 Elliott, Evidence, §107; *Home Ins. Co. v. Marple* (1891), 1 Ind. App. 411.

If appellee did receive this letter—and it was for the jury to say from the evidence, both positive and circumstantial, whether it did or not—and if the jury should determine that it did, then there was some evidence that would prevent the appellee from recovering.

It is the law that where property is sold on a warranty which requires a specified kind of notice within a given time that it fails to fulfil the warranty, any notice

3. received by the vendor and acted upon by him is a waiver of the notice required by the warranty. *J. F. Seiberling & Co. v. Newlon* (1896), 16

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Ind. App. 374; *Aultman & Co. v. Richardson* (1898), 21 Ind. App. 211; *Springfield Engine, etc., Co., v. Kennedy* (1893), 7 Ind. App. 502.

The instruction, while it directs a verdict for appellee, is objectionable upon other grounds. But, in view of the fact that the judgment must be reversed because of its peremptory character, it is unnecessary for us to decide other questions presented by it.

It is the rule that ultimate facts within the issues do not necessarily have to be proved by direct and positive evidence, but may be established by legitimate infer-

4. ences fairly deducible from the evidence and known circumstances and conditions. In this case the questions whether appellee had notice of the defects in the engine and acted upon such notice, and whether it waived the rigid notice required by the warranty, were all within the issues, and there was some evidence pertinent thereto.

It is the sole province of the jury to determine for itself what facts have been established by the evidence, and also to draw its own inferences of essential facts that are reasonably deducible from all the evidence submitted to it. It is not necessary for us to decide here whether, from all the evidence in the case and the legitimate inferences deducible therefrom, appellee had notice, acted upon it, and thus waived those conditions in the warranty requiring notice of defects within a specified time. These were matters, under a proper instruction, and all the evidence in the case, that should have been left to the jury.

The rule seems to be settled in this State that where a determination of the issues involves the credibility of witnesses, and rests upon inferences and deductions to be drawn from facts proved, it is an invasion of the province of the jury for the court to direct a verdict in favor of the party upon whom rests the burden. *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32, and authorities cited.

The rule just referred to is applicable here, and it was error to give the peremptory instruction.

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The judgment is reversed, and the trial court is directed to sustain appellants' motion for a new trial.

HALL v. TERRE HAUTE ELECTRIC COMPANY.

[No. 5,396. Filed December 6, 1905. Rehearing denied February 14, 1906. Transfer denied May 15, 1906.]

1. **TRIAL.—Instructions.—Peremptory.—Evidence.—How Considered.**—To determine the propriety of giving a peremptory instruction all facts and inferences should be considered against the party asking such instruction, and in case of conflict, all that evidence favorable to the asking party should be excluded. p. 45.
2. **SAME.—Instructions.—Peremptory.—Contributory Negligence.**—Contributory negligence is a defense in a personal injury case, and a peremptory instruction for defendant is erroneous unless the facts and inferences are such that no other reasonable conclusion could be reached. p. 46.
3. **STREET RAILROADS.—Passengers.—Who Are.**—Persons boarding a street car which stops upon the street are passengers thereon, such stopping, in the absence of notice to the contrary, being an invitation to take passage; and payment of fare is not essential to make such persons passengers. p. 46.
4. **APPEAL AND ERROR.—Appellate Court Rules.—Briefs.**—Where appellant has made a good-faith attempt to comply with Appellate Court rules in preparing his brief and has in his way presented in a substantial manner the errors relied upon, his appeal will not be dismissed. p. 47.

From Superior Court of Vigo County; *Orion B. Harris*, Judge.

Action by William Hall against the Terre Haute Electric Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

R. B. Stimson, H. A. Condit and Catlin & Catlin, for appellant.

McNutt & McNutt, for appellee.

ROBY, C. J.—In the single paragraph of complaint it is substantially alleged that appellee owned and was operating an electric street railway in the city of Terre Haute, and that appellant attempted to board one of its cars standing

on said railway, at a regular stopping place upon one of the streets of said city, for the purpose of becoming a passenger thereon, and while in the act of boarding said car for said purpose appellee's servant negligently started the same and thereby threw appellant off and broke his leg. The issue was formed by a general denial, cause submitted for trial to a jury, and at the conclusion of the evidence a peremptory instruction to find for the defendant was given. An exception was reserved, and the action of the court in giving such instruction presents the question for decision.

The injury complained of occurred in the city of Terre Haute, on November 10, 1900, at which time appellee owned and operated an electric railway system therein, the main line of which occupied Wabash avenue and South Third street, the direction of the former being east and west and of the latter, north and south. The line on Wabash avenue was double tracked, but on Third street there was a single track only, excepting that a switch extended 120 feet south of the avenue. Some cars turned south and continued on Third street, others were taken to the end of the switch and placed in position for the return trip over the avenue. For one fare, passengers were entitled to a continuous ride to any part of the system, being transferred from one line to another, when necessary. The regular stopping place for all cars bound south was just south of the south line of Wabash avenue. After rounding the curve at this point, all main-line and south-bound cars regularly stopped for the purpose of discharging and transferring passengers, but cars which ran no further south than the switch stopped only for the purpose of discharging passengers. Appellant was a man sixty-three years old, and desired to go fourteen squares south of the avenue. He carried a valise weighing from twenty-five to fifty pounds. It was then 5 o'clock, or later, and getting dark. The day was wet and cloudy. When he was at the corner of said streets, opposite the regular stopping place, he observed a car one and one-half blocks distant, coming west. He

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crossed to the southwest corner and stayed in the street near the track waiting for a south-bound car at the regular stopping place, as aforesaid. There were other vehicles through and among which he had made his way to the crossing. The car stopped as usual, but did not quite clear the curve. Appellant was within ten feet of it when it stopped. The conductor stepped off, assisted a lady to alight, and returned to the platform. Appellant followed him, putting his left foot upon the step, grasping the hand rail in his left hand, and carrying the valise in his right. He testified that the car was standing still. There is other evidence to the effect that it was in motion. The conductor stood in the rear door. Appellant said: "Is this car going to south Third?" The conductor said: "No, sir." The car immediately started with a jerk, and a swinging motion, owing to the curved track, and appellant was thrown off and his hip-joint broken. The car ran on south to the switch and was then returned to Wabash avenue. The actual purpose of its stop was to discharge passengers. It was appellee's custom, when a passenger boarded its cars under such circumstances, to collect a fare and if he returned to charge a second fare. The conductor was not looking for passengers, saw appellant on the step, and "never noticed any more." It was the custom to carry on the front and rear of cars movable signboards, showing the name of the place or street to which they were bound, such cars being otherwise indistinguishable. There is evidence from which it may be fairly inferred that no such sign was on the front end of the car in question. In considering a motion for a peremptory instruction, the court is

1. bound to accept as true all facts which the evidence tends to prove, and all such inferences as are reasonably deducible therefrom against the party asking a protection of the verdict, and, in case of conflict in the evidence, excluding that favorable to him. *Curryer v. Oliver* (1901), 27 Ind. App. 424.

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The question of contributory negligence was for the jury, and the peremptory instruction cannot be sustained by reference to facts bearing upon that issue, the

2. affirmative of which was upon appellee. *Chicago, etc., R. Co. v. Barnes* (1905), 164 Ind. 143; *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32.

Appellee justifies the action of the court upon the theory that it was under no legal obligation to appellant, except not wilfully to injure him. A street railway com-

3. pany is granted its franchise in order that it may carry passengers. When it brings upon the street a car equipped for such purpose, stopping the same at a place selected by it at which to receive passengers, and the person desiring to be transported boards, or attempts to board, such car for such purpose, he becomes a passenger thereon, the act of stopping the car at the customary place being an implied invitation to those waiting to take passage. *Citizens St. R. Co. v. Jolly* (1903), 161 Ind. 80; *Citizens St. R. Co. v. Merl* (1901), 26 Ind. App. 284; *Gaffney v. St. Paul City R. Co.* (1900), 81 Minn. 459, 462, 84 N. W. 304; *Drew v. Sixth Ave. R. Co.* (1862), 26 N. Y. 49; *Ganiard v. Rochester, etc., R. Co.* (1888), 50 Hun 22, 2 N. Y. Supp. 470; *Ganiard v. Rochester, etc., R. Co.* (1890), 121 N. Y. 661, 24 N. E. 1092; *Wallace v. Third Ave. R. Co.* (1898), 55 N. Y. Supp. 132, 135; *Gordon v. West End St. R. Co.* (1900), 175 Mass. 181, 55 N. E. 990; *McDonough v. Metropolitan R. Co.* (1884), 137 Mass. 210; *Schepers v. Union Depot R. Co.* (1895), 126 Mo. 665, 29 S. W. 712; *Joliet St. R. Co. v. Duggan* (1892), 45 Ill. App. 450; Nellis, *St. R. Accident Law*, p. 44. If appellee did not wish to extend such invitation, its duty was to give those in waiting notice to that effect. *Citizens St. R. Co. v. Jolly, supra*. The person desiring passage, who boards the car without such notice, indicating his intention of becoming a passenger thereon, cannot be treated as a trespasser. *Citi-*

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zens St. R. Co. v. Jolly, supra. Appellant boarded a car which stopped at the usual place for the purpose of being conveyed to his destination. A special contract with the company, based upon payment of fare, was not essential to make him a passenger. *Butler v. Glens Falls, etc., St. R. Co.* (1890), 121 N. Y. 112, 24 N. E. 187; *Clark, Accident Law* (2d ed.), §§1-3. The evidence was conflicting with regard to a number of matters, but that most favorable to the appellee was sufficient to take the case to the jury, and the court therefore erred in giving the peremptory instruction.

It has been argued that the appeal was not effective to present the merits of the controversy, on account of appellant's failure properly to index the transcript and

4. to comply with rule twenty-two, so far as the same requires the appellant's brief to contain a condensed recital of the evidence. The first objection has been remedied upon motion. Rule twenty-two is as follows: "The brief of appellant shall contain a short and clear statement disclosing: * * * Fifth. A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. If the insufficiency of the evidence to sustain the verdict or finding in fact or law is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the subject clearly and concisely." The purpose in prescribing rules relative to the contents and arrangement of briefs is to procure an orderly and intelligent presentation of the questions the merits of which it is desired to have considered. Given a standard for the arrangement of such matter, individual briefs, in a general and reasonable way, are expected to conform thereto. No absolute standard of literary attainment can be laid down or followed. Each person who prepares a brief imparts his own personality to it, in a large degree, and the rule was not intended to destroy or minimize such

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expression. No two men will make a condensed recital of evidence in narrative form, in the same words, nor will they arrange the matter exactly alike. When a good-faith effort is made to enlighten the court, and to conform to the practice specified, the rule cannot be invoked as a basis for refusing to determine the substantial issues presented. To do so would be to exercise an unwarranted authority, and substitute an artificial standard for the substance of justice. Appellant's brief sufficiently conforms to the rule, in the respect indicated, to enable the court to comprehend the propositions relied upon, and the reference made to the typewritten transcript guards against any possibility of error as to what the facts were.

For error in giving the instruction above referred to, the judgment is reversed, and the cause remanded, with instructions to sustain appellant's motion for a new trial, and for further consistent proceedings.

SHIPLEY v. SHIPLEY.

[No. 5,566. Filed May 16, 1906.]

1. TRUSTS.—*Parol.*—*Husband and Wife.*—*Real Property.*—A trust is not created by the husband's securing conveyances of real estate which he paid for to be taken in the wife's name upon an oral promise by her to reconvey to him when the purchase price was fully paid, such agreements being made prior to the act of 1881 (Acts 1881, p. 527). p. 50.
2. FRAUDULENT CONVEYANCES.—*Setting Aside.*—*Husband and Wife.*—Where a wife by fraud secures the legal title to her husband's real estate, the same may be set aside. p. 52.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Suit by Mary E. Shipley against John P. Shipley. From a decree for plaintiff, defendant appeals. *Affirmed.*

Stuart, Hammond & Simms and *Charles E. Thompson*, for appellant.

J. Frank Hanly and *Will R. Wood*, for appellee.

MYERS, J.—Appellee began this suit in the court below against appellant, demanding a divorce.

The questions here presented for decision and not waived are predicated on the ruling of the court in sustaining appellee's motion to strike out a part of appellant's second paragraph, and in sustaining appellee's demurrer to the third paragraph of his cross-complaint. Appellant's second paragraph avers their marriage in 1873; that they lived together as husband and wife in Tippecanoe county, Indiana, with certain exceptions, until the latter part of January, 1902, and, after averring grounds for a divorce, alleges in substance the following, which on motion was stricken out: That at the time of the marriage appellee was the owner of three and one-fourth acres of land in Tippecanoe county, Indiana, of the probable value of \$30 per acre; that after said marriage appellant purchased from time to time tracts of real estate adjacent to that of appellee, aggregating fifty-three acres, and has by his individual means fully paid for the same; that the title to all of said real estate so purchased was, at appellee's request and upon her promise to hold the same as trustee, conveyed to her, with and upon the express understanding, contract and agreement made and entered into by and between appellant and appellee at the time the conveyances and each of them were procured and so made, that she would take and hold the title to the same in trust as trustee for appellant until the same was fully paid for, and upon payment by him of the full purchase price she would convey to appellant, by proper and sufficient deed or deeds of conveyance, all said real estate so purchased, and vest in him the absolute title thereto; that also, as a part of said contract and agreement, appellant, from the time of such purchases, was to have the full possession, use and control thereof; that said agreement was entered into without any fraudulent intent on the part of either, and at the time of such agreement appellant was not indebted to any person in any amount in excess of the

property then owned and held by him, subject to execution, except for purchase money for said real estate, and which was amply secured by mortgages thereon; that by said agreement appellant took and had possession of all of said real estate so purchased, and received all the rents and profits therefrom, and cared for said property as his own from the time of its purchase until said separation, when appellee took charge of the same, and has since continued in possession thereof, in violation of her trust as such trustee; that appellee held the same in trust for appellant by virtue of their agreement and not otherwise; that appellant has no other property; that the same is the result of his earnings while he so lived with appellee, including \$1,000 received from his father's estate; that the present reasonable cash value of the same is \$3,820; that he relied upon the promise and agreement upon the part of appellee, and had said property conveyed to her and in her name as trustee; that prior to the bringing of this suit he demanded from appellee a conveyance of said real estate to him in accordance with said agreement, which appellee refused, and she has at all times refused to join appellant in conveying said property to a third person, to be transferred to him in carrying out and fulfilling said trust; that appellee, in violation of her said trust, now claims to be the exclusive owner of the real estate, and that appellant has no right, title or interest therein.

The third paragraph avers practically the same facts as are averred in the second, relative to the marriage, the purchase of and paying for the property, manner in which the title was held, demand and refusal to convey, etc.

Upon these facts appellant earnestly insists that appellee became the trustee of a resulting trust in favor of appellant;

that the agreement made contemporaneously with

1. the conveyances did not operate to create an express trust, but that its effect was simply and solely to rebut the presumption that the conveyances were intended

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as a gift or advancement, and that when that presumption was overcome, a trust resulted by implication of law.

From the facts appearing in the case at bar, we are not advised as to the time when the agreements and conveyances set out in the cross-complaint were made. If prior to the legislative enactment in force September 19, 1881 (Acts 1881, p. 527), then clearly the cases of *Montgomery v. Craig* (1891), 128 Ind. 48, and *Murray v. Murray* (1899), 153 Ind. 14, would control the decision of this case.

It has been judicially declared that a married woman may, in writing, become trustee for her husband and be compelled to execute her trust (*Moore v. Cottingham* [1883], 90 Ind. 239); but by the cases of *Montgomery v. Craig, supra*, and *Murray v. Murray, supra*, it is held that as between husband and wife there can be no resulting or implied trust. The two cases last cited were considered and decided long after the legislature had abolished all disabilities of married women to contract except in two classes of cases, neither of which includes the case at bar. One of these cases exhibits a contract made prior to said legislative enactment, while the opinion in the latter does not disclose the date of the contract then under consideration. Applying the law as announced in the latter two opinions to the facts in this case, together with the elementary principle that all presumptions must be indulged in favor of the proceedings and judgment of the trial court, our conclusion must be with the appellee.

The question of the rights of the parties upon the facts as disclosed by this record, limited to our present statutory provision relative to the ability of married women to contract, is not before us, and on this question we therefore express no opinion.

Our attention has been called to many cases, some of which belong to that class where the wife has obtained the

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title to land from her husband through fraud or

2. deception. In that class the courts have universally set such titles aside and reinvested the husband with it, not on the theory of a resulting trust, but because of the fraud practiced on him, rendering the title thus procured invalid and void. A number of these cases have been collected and quoted from in the case of *Basye v. Basye* (1899), 152 Ind. 172. The case now before us does not proceed upon the theory of fraud or deceptive influences exerted on the husband by the wife, whereby he was induced to have the property conveyed to her, but depends solely upon her agreement made at the time of receiving the conveyances, and is therefore an action purely to enforce a trust.

If we are correct in our theory of this case, there is no error in the record.

Judgment affirmed.

THE STATE v. BOARD OF COMMISSIONERS OF THE COUNTY OF NEWTON ET AL.

[No. 5,967. Filed December 23, 1905. Appeal dismissed May 16, 1906.]

1. COUNTIES.—*Court-Houses.—Unauthorized Erection.—Title.*—Where the county in good faith, but without legal authority, partially erected a court-house and paid for such part, such unfinished structure will be considered as at the disposal of the county. p. 59.
2. INJUNCTION.—*Unfinished Court-House.—Nuisance.—Purpresture.*—A county cannot be compelled by injunction to tear down and remove an unfinished court-house, erected without legal authority, but in good faith, a new court-house being necessary, on the ground that such unfinished court-house constitutes a nuisance or purpresture. p. 60.
3. APPEAL AND ERROR.—*Injunction.—Power of Appellate Court.*—While the granting of a temporary injunction by the Appellate Court is ancillary to the litigation and is made to preserve

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the subject-matter thereof *in statu quo*, yet, the court will not grant same where the effect would be inequitable or wrongfully injurious. p. 62.

4. **APPEAL AND ERROR.**—*Injunction.*—*By Appellate Court.*—*Rule.*—The Appellate Court before granting a temporary injunction will examine the whole record and if it plainly appear that the petitioner therefor will not be entitled on the final hearing to such relief, that fact will be considered in the decision on the motion for a temporary order. p. 62.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

Suit by the State of Indiana against the Board of Commissioners of the County of Newton and others. From a decree for defendants, plaintiff appeals. On motion for a temporary injunction. *Motion denied.*

Robert O. Graves, Herman C. Rogers, Merrill Moores, A. D. Babcock and Estel E. Pierson, for appellant.

William Cummings, for appellees.

BLACK, P. J.—The transcript on appeal in this cause having been filed in this court December 7, 1905, the appellant on the same day filed its motion for a temporary injunction herein.

Upon the hearing of this motion the following facts are presented, as disclosed by the record on appeal: the verified motion for a temporary injunction, the proceedings of the Board of Commissioners of the County of Newton, the proceedings of the county council thereof, and the affidavits of competent witnesses submitted. The town of Kentland is the county seat of Newton county, and therefore the proper place for a court-house, furnishing suitable accommodation for the courts and the various county officers, and for the proper storing and preservation of the public records. Upon the public square in that town, owned by the county, there exists a building devoted to such uses, which was erected many years ago at a small cost, which is in a dilapidated condition and unfit for the purposes of a court-house. December 17, 1904, the county council adopted an

order purporting to authorize the board of county commissioners to borrow \$25,000, to be used for the purpose of erecting a court-house on the court-house square in that town, and to authorize and direct that board to issue negotiable bonds of the county for that sum, and to appropriate to such purpose the money derived from the sale of the bonds. On January 2, 1905, the board of commissioners contracted with an architect for plans and specifications for a court-house and for the superintendence of its construction, and on February 6, 1905, the board approved plans and specifications submitted by an architect, and directed advertisements for proposals for the erection of the building, to be received April 3, 1905. Thereupon an action was brought in the court below by the State, on the relation of Benjamin F. Davis and others, voters and taxpayers of that county, against the board of commissioners and others, to enjoin the letting of the contract. From the judgment rendered in that cause the plaintiff therein appealed to the Supreme Court of Indiana, wherein, on June 30, 1905, the judgment was reversed as to the board of commissioners, and the court below was directed to enter a finding in favor of the plaintiff therein, and to render judgment thereon enjoining the board of commissioners from entering into a contract for the construction of a court-house, and from erecting a court-house or paying out for such purpose any of the funds of the county, under and by virtue of the proceedings of the county council of December 17, 1904. See *State, ex rel., v. Board, etc.* (1905), 165 Ind. 262. In that case the ground upon which the court on appeal declared the invalidity of the action of the board of commissioners appears in the following extract from the opinion of the court: "The record discloses that the Newton County Council attempted to make the appropriation of money for the building of a court-house by a mere motion and an order made in pursuance thereof. This procedure was in plain violation of the statute. The

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adoption of the motion is followed by an order spread upon the record, purporting to authorize the issuance and sale of county bonds to provide the money so appropriated. The statute quoted requires that the issuance of county bonds can be authorized only by ordinance, and the method adopted in this case was in violation of law, and therefore ineffectual and invalid. It follows that no appropriation of money for the erection of a court-house had been made by the Newton County Council at the time appellee board of commissioners was intending and threatening to enter into a contract for the erection of such a building, and that said appellee was proceeding without warrant of law, and that such contract, if made, would be void."

It may seem hardly necessary to remark that the judgment which the Supreme Court directed was to be one having reference to the action of the county council on December 17, 1904, and restraining action pursuant thereto because of its declared invalidity resulting, not from the purpose of the restrained action, but from the form in which the council proceeded, and that such judgment would not affect any subsequent action relating to the construction or repair of public buildings of the county by the administrative officers thereof proceeding in due conformity to the requirements of the statute relating to such matter.

The judgment in the court below from which the appeal was so taken being in favor of the defendants in that cause, the board of commissioners contracted with Eric Lund for the erection of the court-house. He commenced the construction of the building of brick, stone and mortar, and continued the building thereof until the further construction was stopped on June 9, 1905, by an injunction issued by the Supreme Court, since which time no work has been done on the building, according to the verified complaint herein. In the verified motion for a temporary injunction

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herein it is stated that since June 30, 1905, and since the order granted by the Supreme Court, no work has been done or attempted, and that the structure now stands as it was when the workmen left work June 30, 1905. It appears that this structure is an incomplete court-house two stories in height, without roof, and unfurnished as to doors, windows and otherwise; that the incomplete building is well constructed, according to the plans and specifications, and would be well adapted, if completed to the purposes of a court-house.

August 7, 1905, the board of commissioners, pursuant to the statute of 1899 (§5594*v et seq.* Burns 1901, Acts 1899, p. 343), presented to the county auditor a verified estimate, itemized, of the expenses of the board for the calendar year 1906, including, among other items, the following:

“First item. Expense of public buildings and institutions. (1) Court-house. Amount required for the repair and completion of the new court-house, also heating apparatus for the same, plumbing, wiring and architect’s fee\$19,450
 Electric light fixtures..... \$800
 Amount required for furniture for new court-house and vault fixtures..... \$2,500
 Architect, fee for plans, specifications and superintendent’s work \$250
 * * * Fifth item. To pay attorneys’ fees and costs in case of the State, *ex rel.* Davis, vs. This Board, and other expenses of said suit in circuit and Supreme Court..... \$1,000
 To pay [an attorney named], employed by this board for services before board and county council relating to repair and completion of new court-house, and for services in Newton Circuit Court in relation thereto..... \$500”

The board in the same instrument prayed for authority, by ordinance, to issue and sell bonds of Newton county in the sum of \$24,500, to provide funds with which to pay

for the repair and completion of the new court-house, electric light fixtures therein, furniture therefor, for fees, costs, and expenses of the case of the State, ex rel., v. Board of Commissioners and others, and fees of the attorney above mentioned, and the fees of the architect for such repairs and completion of the new court-house; "the current funds to be derived from taxation and other sources of revenue being insufficient for the payment of the above named expenditures. The total of the indebtedness of said county added to the above sum will not exceed two per cent of the taxable property of said county." Afterward, August 25, 1905, in vacation, before the October term of the court below, the appellant filed its verified complaint herein, signed by the prosecuting attorney as such, and by other attorneys, as of counsel, wherein the appellant sought a temporary injunction restraining the members of the board of commissioners and the contractor, Lund, from permitting the public square to be longer obstructed by the structure so erected thereon, and asked that they be ordered forthwith to remove the brick, stone, mortar, plaster and other substances constituting the building, and to restore the public square to the condition which existed prior to April 13, 1905, when the construction was commenced, and that, failing or refusing so to do, the sheriff of that county be ordered forthwith to procure the necessary tools and labor, and to remove such obstruction and every part thereof, and to restore the surface of the public square to the condition in which it was prior to the date last mentioned, and that the expense of so doing be taxed as a part of the costs of this suit, and that the county council and its members, named, be enjoined from making any appropriation for the completion of the unfinished building, or for any of the purposes for which an appropriation was so asked in the estimate of the board of commissioners of August 7, 1905, above mentioned, and that the board of commissioners be enjoined from applying any of the

county funds, then in their charge, or thereafter appropriated, to the expense of completing the building or to the expense of removing it, and that on the final hearing the defendants, who are the appellees, being the board of commissioners and its members, the county council and its members, and Lund, the contractor, be perpetually enjoined from any and all of the acts which it was herein sought to enjoin temporarily, and that they be commanded to remove the obstruction, and to restore the surface of the public square to its former condition, etc.

Afterward, August 29, 1905, in vacation, upon the hearing of the application for a temporary injunction, the judge of the court below, holding that there was no ground for a temporary injunction against any of the defendants except the board of commissioners, made its order temporarily enjoining that board from applying any of the county funds already in their charge or custody, or thereafter appropriated, to the expense of completing, remodeling, improving, or in any manner expending funds of the county upon the unfinished building, and expressly adjudging that the county council was not in any way restrained or enjoined from making appropriations as asked for by the board of commissioners or from authorizing that board to issue and sell bonds for the purpose of obtaining funds to build a court-house, or to remodel or to complete a court-house. Afterward, on the final hearing in term, October 16, 1905, it was adjudged that the appellant take nothing by its complaint, and that the temporary injunction so granted in vacation be dissolved. Thereupon the appellant brought this appeal from that judgment.

It further appears that the county council at its regular annual meeting in September, 1905, by ordinance, made appropriations in accordance with the estimate of the board of county commissioners above mentioned, and by another ordinance authorized the borrowing of money to defray such expenses, and directed the issuing of bonds of the

county therefor. Concerning the regularity of the proceeding of the county council in these matters on this occasion no objection is suggested, and no ground of objection has been observed by us.

By the motion now in hearing we are asked to enjoin, pending the appeal, the board of county commissioners, and all persons acting by, through or under that board, from entering into any contract for the completion or repair of the unfinished structure to be used as a court-house, and from selling any bonds of the county for the purpose of raising money to defray expenses for the repair or completion of that building, it being shown in the motion, and further proved upon the hearing, that the board, by advertisement, has given notice of the letting of such a contract, and notice of the sale of such county bonds.

It appears that so far as the court-house has been built, it has cost \$13,745. It is sufficiently shown that in its erection the county commissioners acted in good

1. faith, believing that they were proceeding according to law, though by the failure of the county council to make the appropriation and authorize the loan, and direct the issue of bonds by ordinance, instead of by order, the action of the board was rendered invalid, as has been decided by the Supreme Court. There is no question involved in the case now here on appeal or in this application for a temporary injunction in relation to the action of the board of commissioners in paying for the unfinished structure; that is, it is not sought to recover the money so paid, or to charge any individuals with pecuniary liability because of such payment. The unfinished building, of considerable value, stands upon the public square, the land of the county appropriated to use as the site of its public office buildings. The person or persons who placed it there have been paid for it, though without authority of law. Such persons or other individuals have no rights as owners

of the structure as it stands, or right to reclaim and remove the materials from the land of the county. If it be admitted that the board of commissioners has authority to cause the building to be torn down and its materials to be removed, this would occasion great expense, for the payment of which no appropriation appears to have been made by the county council. The county commissioners, having control of the ground, permitted the structure to be placed where it is, and without formal authority, though in good faith, the board paid for it. Though the payment was unauthorized, yet there being no individual owner of the structure, of such permanent character, situated upon the real estate of the county, it must be treated as within the disposal of the county, through its proper administrative representatives. Neither the county nor any citizen is seeking its removal.

It is sought in the name of the State, as plaintiff, to compel its removal, as constituting a nuisance or pre-
presture, and to restrain the representatives of the

2. county from making any beneficial use of it. It does not appear that if the structure were destroyed, and its materials were removed from the public square, they would become the property of the State, or of any individual designated, nor is it indicated where the great mass of valuable materials might properly be deposited without infringement of public or private rights.

It appears from the affidavits submitted on this hearing that the structure is so situated that it does not interfere with the use of the old court-house upon the same square, or impede business or obstruct the square to the detriment of the public. Whatever might be said if it appeared to be the purpose of the board of commissioners to maintain the structure permanently in its present unfinished condition, or to allow it to remain indefinitely upon the public grounds, to which all citizens have a right to resort for lawful purposes, and to become ruinous and decayed. yet,

on the contrary, it affirmatively appears that while it is now simply in the condition of a large unfinished building, for the preservation of which from the effects of the weather proper measures have been taken, it is the purpose of the board of commissioners to proceed as speedily as is practicable to make a beneficial use of the structure, by completing its construction as a court-house, much needed, and by so equipping it that it will not have any quality of a nuisance, but will be an ornamental and useful public building properly located. It is not questioned that, if this structure were removed, the administrative officers of the county would have full authority of law, by and through the forms which they have pursued for the completion of the building, to construct on the same place a new building such as is now in contemplation. It does not clearly appear that the same materials might not, without infraction of any rule of law, be used in such reconstruction. It is impossible to recognize how any public or private interest would be subserved by destroying, at great expense in money and in time, this costly structure, preparatory to commencing anew, after a long period, the beneficial public enterprise of providing a sufficient court-house. It is not sought in this proceeding to recover damages as such, or to impose punishment upon any individuals for the creation or maintenance of a nuisance; but it is proposed that all and each of the defendants be commanded to remove the structure, and to restore the square to its former condition, and that if the members of the board of commissioners, as individuals, and the contractor will not do so, the sheriff be ordered to cause the building to be removed and the surface of the square to be restored, and that the expense thereof be taxed as part of the costs of suit in this case.

Whatever may be said concerning such a prayer, which forms no part of the attempted statement of a cause of action, it is impossible to see how any benefit could accrue

from the result to the appellant, the State, or to any political subdivision of the State, or to the citizens thereof, or to any individual. Nor is it apparent how any public or private harm will accrue from the proposed beneficial use of the partly constructed building. While the purpose of the action by the State is to procure the destruction and removal of the existing building, and to prevent the use of the material in the construction of the contemplated courthouse, and to enjoin the incurring of expense by the county alone for completing it, we are now asked to enjoin appellees, pending the appeal, from completing the building and putting it in such condition that it cannot be regarded in any sense as a nuisance or an improper obstruction or inclosure of part of the public square, and to enjoin temporarily the borrowing of money for the payment of the estimated expenses in completing and in properly furnishing the building.

While an injunction granted by this court is merely ancillary, and is awarded, not strictly upon principles of equity, but for the purpose of so far preserving the

3. subject-matter of litigation *in statu quo* that our judgment upon final hearing may not in any respect be ineffectual, yet it is proper for us to consider the record so far as to contemplate intelligently the effect of such temporary restraint upon the litigating parties, and though our conclusion may sometimes compel us to characterize the whole proceedings, we must not hesitate to refuse to do an inequitable or useless or wrongfully injurious thing by our temporary order.

The whole record is before us, and if it plainly appear therefrom that the appellant will not be entitled to relief sought therein upon the final hearing, this may be

4. given proper influence in deciding upon the application for a temporary injunction, as indicating that there is no proper occasion for enforcing the preservation of existing conditions pending the appeal. All the

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items of expense presented by the board of commissioners through the auditor to the county council related to the completion of the unfinished structure and the proper furnishing thereof as a court-house, except certain items in relation to compensation to attorneys for service rendered the board, and the expenses of a certain suit in court. In the motion in hearing nothing is asked and nothing is said concerning such fees and expenses. We have thought it proper not to enter upon any discussion of the question suggested by counsel as to the propriety or permissibility of making the State of Indiana the plaintiff in such a suit, inasmuch as it has appeared to us that the consideration of the merits of the motion before us requires the denial of the relief sought in this application, and the question as to the want of proper parties for any of the purposes of the suit may be left without discussion at this stage.

The motion for a temporary injunction is overruled.

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[No. 5,703. Filed May 16, 1906.]

1. JUDGMENT.—*Default.—Res Judicata.*—In a judgment by default only those matters properly pleaded in the complaint are *res judicata*. p. 72.
2. DESCENT AND DISTRIBUTION.—*Widow Remarrying.—Alienation of Real Estate.—Statutes.*—Under the act of 1852 (1 R. S. 1852, p. 248, §18, 1 G. & H., p. 294) a widow remarrying could not alienate her real estate descending from her former husband; and at her death such lands descended to the children of such former marriage. p. 72.
3. SAME.—*Widow Remarrying.—Alienation of Real Estate.—Statutes.*—Under the act of 1879 (Acts 1879 [s. s.], p. 123, §2484 R. S. 1881, §2641 Burns 1901) a widow remarrying can not alienate real estate inherited from a former husband unless her husband and all children of such former marriage, who must all be over 21 years old, join in the conveyance; and at her death such land, if not thus alienated, descends to such children. p. 73.

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4. **PLEADING.—Judgment.—Res Judicata.—Matters Concluded.**—In determining the matters concluded in a judgment pleaded in answer, the court will look to the issuable facts pleaded in such former case and not to the conclusions set forth in such answer. p. 73.
5. **DESCENT AND DISTRIBUTION.—Widow.—Rights in Husband's Real Property.**—Under the act of 1852 (1 R. S. 1852, p. 248, §27, §2491 R. S. 1881, §2652 Burns 1901) the surviving widow inherits in fee simple one-third of her deceased husband's real estate which she may dispose of during widowhood, but she can not alienate such lands during a remarriage. p. 74.
6. **SAME.—Widow Remarrying.—Rights of Children During Such Marriage.**—The children of the marriage with a former husband from whom the remarrying widow inherited lands have no interest in such widow's portion during her life. p. 74.
7. **PARTITION.—Parties.—Remarrying Widow.—Children of Former Marriage.**—The children of the former marriage are proper parties in a suit for partition by the remarried widow. p. 74.
8. **SAME.—Quieting Title.**—Title is not adjudicated in the ordinary suit for partition, though the nature of the titles of the parties be set out. p. 74.
9. **SAME.—Quieting Title.—How Question Presented.—Pleading.**—In a suit for partition by a remarried widow against the children of the former marriage, the complaint merely showing the portions respectively inherited by the parties and failing to show that the children were making any claims to her portion, a judgment by default is not *res judicata* as to the rights of such children to such widow's portion at her death. p. 74.
10. **PLEADING.—Complaint.—Partition.—Quieting Title.—Presumptions.**—The presumption that title was not in issue in a partition suit is not overthrown by allegations, in an answer, that such suit was to quiet title, that plaintiff sought to have her title quieted and that title was in issue. p. 75.
11. **JUDGMENT.—Partition.—Remarrying Widow.—Title of Children to Widow's Lands.**—A judgment by default decreeing partition of lands inherited by a remarrying widow and the children of her former marriage merely allots the lands, and such widow takes her share subject to the law of descent casting the inheritance thereof on such children in case of her death during her subsequent marriage. p. 75.
12. **DEEDS.—Descent and Distribution.—Remarrying Widow.—Statutes.**—Under §2641 Burns 1901, §2484 R. S. 1881, a remarrying widow and a part only of the children of her former mar-

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riage cannot convey any part of her one-third interest in the former husband's real estate; and their warranty deed thereof creates no estoppel against those so joining therein. p. 75.

13. **ESTOPPEL.**—*Deeds.*—*Warranty.*—*After-Acquired Title.*—The execution of a valid warranty deed estops the grantor from asserting an after-acquired title. p. 76.
14. **QUIETING TITLE.**—*Defense.*—*Fraud Against Third Parties.*—It is no defense that the plaintiff in a suit to quiet title obtained his title by fraud practiced upon third parties where such title is not disaffirmed. p. 76.

From Grant Superior Court; *H. J. Paulus*, Judge.

Suit by David P. Long against Martin Pence and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Manley & Strickler and *Elliott, Elliott & Littleton*, for appellants.

Custer & Cline, for appellee.

BLACK, P. J.—Martin Pence alone assigns as errors the sustaining of demurrers to each of his four paragraphs of answer to the complaint and the supplemental complaint of the appellee against Martin Pence and a number of other defendants.

The complaint alleged that the appellee and twelve certain persons of the defendants were the owners in fee simple of certain described real estate, being twenty-six and two-thirds acres of land in Grant county, stating their several shares; that the other three of the defendants, Martin Pence, Allen Pence and Lizzie Pence, his wife, each claimed some lien, interest and title in the land adverse to the appellee's right and title and adverse to the right and title of each of the other defendants, which claims were without right and a cloud upon the title of the appellee and said twelve other defendants in and to the real estate; that the land could not be partitioned and the interests of the several parties could not be set off to them without injury to the parties. Prayer, that the appellee and the defendants except Martin Pence, Allen Pence and Lizzie Pence, his wife, be declared the owners, in the shares set out; that

partition be awarded, and the title of the owners to their respective interests be quieted; that said excepted defendants be required to show what interest or title they or either of them might have, if any, and that a commissioner be appointed to make sale, etc. In the supplemental complaint it was alleged that since the filing of the complaint the appellee had purchased all the right, title and interest in and to the real estate of nine of the defendants, named, alleged in the complaint to be part owners, and that the appellee was then the owner of the respective interests of those nine defendants, together with the interest alleged in the complaint to be owned by him, making his entire interest the ⁵⁶⁸¹/₅₇₆₀ part thereof; and the undivided interests of the three other owners, Daffy Long, Von Barngrover and Fred Barngrover, were stated.

In the first paragraph of the answer of Martin Pence it was shown, in substance, that in 1856, Adolphus R. Long was the owner in fee simple of a certain tract of eighty acres of land in Grant county, and in that year he died, leaving as his only heirs at law his widow, Mary Long, and eight children, named as follows: Susan M. Long (afterward Susan M. Bell, by marriage), Amanda Long (afterward Amanda Barngrover, by marriage), Dicey Long (afterward Dicey Grindle, by marriage), Emily J. Long (afterward Emily J. Boswell, by marriage), David P. Long, plaintiff and appellee herein, Benjamin F. Long, Jasper N. Long and Oliver M. Long; that by his death the widow became seized of the undivided one-third of said eighty acres in fee simple, and each of the eight children became seized of the undivided one-twelfth thereof; that afterward Mary Long, the widow, married William La Forge; that in 1867, said Mary La Forge, William La Forge, her husband, Susan M. Bell, Amanda Barngrover and Dicey Grindle, of the heirs of Adolphus R. Long, commenced in the circuit court of Grant county, Indiana, a suit in partition and to quiet title to

said real estate, David P. Long, the appellee, Benjamin F. Long and Jasper N. Long being made defendants therein; that each of the defendants therein, including the appellee, was duly served with summons issued from that court more than ten days prior to the first day of the December term, 1867, of that court, the day set for the hearing of the cause; that each of these defendants failed to appear and was duly defaulted by the court; that said court had jurisdiction of the subject-matter and of the person of each defendant therein, including the appellee; that thereupon, the defendants having failed to appear and answer, the court duly rendered a judgment and decree that Mary La Forge was the owner in fee simple of an undivided one-third of said real estate, as alleged in the complaint of that cause, and partition of the real estate was ordered by the court; that thereafter commissioners were duly appointed by the court to make partition of the real estate in accordance with the judgment and decree, Mary La Forge to have set off to her the one-third in value of the real estate; that thereafter, at the April term, 1869, of that court, the commissioners made report to the court of the partition of the real estate, in which report there was set off to Mary La Forge the one-third of the real estate in value, the portion so set off to her containing twenty-six and two-thirds acres, more or less, the description being that of the land described in the complaint in the case at bar; that said court thereupon approved and confirmed the report of the commissioners and entered a final decree that Mary La Forge was the owner in fee simple of the tract so set off to her; that her title in and to said tract of twenty-six and two-thirds acres was quieted against each and all of the other plaintiffs in said cause and against each and all of the defendants therein, including the appellee; that said plaintiffs other than Mary La Forge and said defendants therein were each by the terms of said decree divested of all their right and title to the real estate so set

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off to Mary La Forge; that said decree was duly entered of record in the records of the clerk's office, etc., and July 5, 1869, a certified copy of the same was duly recorded in the recorder's office of Grant county, etc. It was further alleged that in the complaint in that cause Mary La Forge "sought to determine and to quiet the title to said real estate in her, and asked that her title thereto be quieted as against each of the plaintiffs other than herself and against each of said defendants in said action; that the title to said lands of Mary La Forge was in issue in said complaint and cause; that said defendants, including said David P. Long, failed to make any defense to said action at any time, and failed to file any answer or demurrer to said complaint;" that said decree of the Grant Circuit Court was not appealed from by any party to said suit, and it remains in full force and effect; that June 13, 1893, Mary La Forge and William La Forge, her husband, conveyed the real estate so set off to her to the answering defendant, Martin Pence, by deed duly executed to him, which was duly recorded; that the appellee in his complaint and supplemental complaint herein seeks to recover and have partition of the identical real estate so set off to Mary La Forge and by her conveyed to this defendant; that Mary La Forge died in June, 1899; that the only right or interest claimed by the appellee in his amended and supplemental complaint in and to said real estate is claimed by him as an heir of said Adolphus R. Long and said Mary La Forge and by alleged purchase from other heirs of those persons, each of which heirs was a party, either as plaintiff or defendant, to said suit in the Grant Circuit Court, and that the appellee has not, nor does he claim, any other right or title therein; and this answering defendant says that the appellee has no right, title or interest in the real estate.

The second paragraph purported to answer the complaint so far as it was thereby sought to recover and have partition of the undivided two-eighths of the real estate

described in the complaint. This paragraph's averments of facts were like those of the first paragraph down to and including the averment that the decree of the Grant Circuit Court remained in full force, except that it omitted the averment of the first paragraph, that "said plaintiffs other than said Mary La Forge and said defendants named were each by the terms of said decree divested of all their right and title to the real estate so set off to Mary La Forge, as above described," and also omitted the averments "that in the complaint in said cause the plaintiff Mary La Forge sought to determine and quiet the title to said real estate in her, and asked that her title thereto be quieted as against each of the plaintiffs other than herself and as against each of said defendants in said action; that the title to said lands of Mary La Forge was in issue in said complaint and cause; that said defendants, including said David P. Long, failed to make any defense to said action at any time, and failed to file any answer or demurrer to said complaint." It was then alleged in the second paragraph of answer that Mary La Forge took possession of the lands so set off to her; that June 13, 1893, she and Willam La Forge, her husband, conveyed said real estate to the answering defendant; that Emily J. Boswell and Joseph S. Boswell, her husband, and Oliver M. Long, the children of Mary La Forge, by her marriage to Adolphus R. Long were all then over the age of twenty-one years, and each of them joined in said conveyance to this defendant, and thereby ratified and approved the conveyance by Mary La Forge and her said husband; that the deed for such real estate was duly executed on that day by these persons, and was by them delivered to this defendant and by him duly recorded, etc.; that Mary La Forge died in June, 1899; that the appellee by his complaint and supplemental complaint herein seeks to recover and have partition of the real estate so set off to Mary La Forge and by her so conveyed;

that the only right or interest claimed by the appellee herein is claimed by him as an heir of Adolphus R. Long and Mary La Forge and by an alleged purchase from others of their heirs, each of whom was a party, either as plaintiff or defendant, to said action in the Grant Circuit Court, and the appellee does not have or claim any other right or interest therein; that Emily J. Boswell, Joseph S. Boswell and Oliver M. Long are estopped by their deed from claiming any right, title or interest in the land, and the appellee, as their assignee, is likewise estopped as to any interest or title claimed through them or either of them, etc.; and the appellee has no right, title or interest in said two-eighths of the real estate.

The third paragraph purported to be an answer as to the undivided four-eighths of the real estate. It contained the same averments as the second paragraph as to two-eighths of the real estate. It was then further alleged that, after the death of Mary La Forge, Joseph S. Boswell, who had joined in the conveyance made by her and her husband to this defendant, purchased from other heirs of Adolphus R. Long and Mary La Forge the undivided two-eighths of the real estate, and, prior to the commencement of this suit, conveyed the same to the appellee; but that Joseph S. Boswell and Emily J. Boswell, his wife, having joined in said conveyance by Mary La Forge to this defendant, and having thereby ratified and approved it, are estopped thereafter to claim any interest therein, and that the appellee, who is the assignee of said Boswells, is likewise estopped to claim any interest, right or title in the portion of said real estate conveyed to him by said Boswells; and that he has no right, title or interest in said four-eighths of the real estate.

The fourth paragraph purported to answer so much of the complaint and the supplemental complaint as sought to recover and have partition of five-eighths of the real estate; and it was therein alleged, substantially, that said

five-eighths part, at the commencement of this action and at the time of filing this answer, belonged to and was owned by certain persons named, not including the appellee or the answering defendant; that September 11, 1900, these persons were the owners of the undivided five-eighths of a certain other tract of land in section fifteen adjoining on the south section ten in which the land described in the complaint was situated; that thereafter, and prior to the commencement of this suit, the appellee purchased from these persons their respective interests in this other land; that the deeds of conveyance thereof were drawn by the appellee, or under his instruction; that with the intention of defrauding these persons out of their interest, right and title to said five-eighths of the real estate in section fifteen, the appellee so drew and constructed the deeds that they contained the description of the lands described in the complaint herein, all of which was done without the knowledge of these persons from whom he so purchased; that the appellee had not at any time purchased from these persons their interest, right and title to the lands described in the complaint herein or any part thereof, nor was it the intention of said persons to convey to him any portion of such interests, right or title to the lands in section ten, and not in section fifteen; that the appellee fraudulently procured said persons to execute to him deeds of conveyance for the lands in section fifteen, which deeds also fraudulently and wrongfully included the description of the lands described in the complaint; that said grantors, at the time of the execution of the deeds, did not know that they contained the description of the lands described in the complaint, and the appellee fraudulently and wrongfully failed to inform them at the time of the execution of the deeds that they did contain such description; that he had not and has not paid or agreed to pay these grantors any consideration for the lands described in the complaint or their interest therein, and they would not have executed the deeds

had they known that they contained descriptions of the lands described in the complaint; that they each relied upon the appellee to prepare deeds of conveyance for the lands in section fifteen, which he had purchased from them, and to insert the correct and true description, and believed that the deeds contained only the description of the lands so purchased in section fifteen; that by reason of the foregoing facts the appellee has no interest, right or title to said five-eighths of the real estate described in the complaint; that the appellee has not and does not claim any right, interest or title in said five-eighths of said real estate other than that arising from the execution to him of said deeds of conveyance so fraudulently obtained by him.

In the first paragraph of answer reliance is placed upon the assumed effect of the decree therein mentioned, which was rendered upon default and was conclu-

1. sive only as to matters properly pleaded in the complaint in that suit. *Unfried v. Heberer* (1878), 63 Ind. 67, 72; *Goble v. Dillon* (1882), 86 Ind. 327, 44 Am. Rep. 308; *Barton v. Anderson* (1886), 104 Ind. 578; *Allen v. Rice* (1897), 16 Ind. App. 572.

The first paragraph of answer sets forth the facts which indicate the character of the title of Mary La Forge at the time of the rendition of the decree. When her

2. former husband died in 1856, and when the decree in question was rendered, it was provided by section eighteen of our statute of descents (1 R. S. 1852, p. 248, 1 G. & H., p. 294): "If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and, if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." This statute absolutely pro-

hibited and rendered void any alienation of the property so derived, under the circumstances stated in the statute. *Vinnedge v. Shaffer* (1871), 35 Ind. 341; *Mattox v. Hightshue* (1872), 39 Ind. 95; *Avery v. Akins* (1881), 74 Ind. 283.

That section of the law of descent was amended in 1879 (Acts 1879 [a. s.], p. 123, §2484 R. S. 1881, §2641 Burns 1901) to read as follows: "If a widow shall marry

3. a second or any subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage, such widow may not, during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate; and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be: Provided, however, that such widow and her living husband may alienate such real estate, if her children by the marriage in virtue of which such real estate came to her shall all be of the age of twenty-one years and join in such conveyance," etc. A conveyance made in contravention of the statute as thus amended is likewise void. *Aetna Life Ins. Co. v. Buck* (1886), 108 Ind. 174; *McCullough v. Davis* (1886), 108 Ind. 292, 294.

The appellant Martin Pence, deriving his alleged title through a conveyance made under circumstances rendering it void and not rendering the asserted title of the

4. appellee invalid, relies upon the decree in the partition suit wherein the portion of the widow was set off to her, claiming that the title was involved in that suit and was by the decree therein quieted as against the parties other than the widow. What was determined in that case is to be ascertained by consideration of the issuable facts pleaded, and not by the mere conclusions in the answers or the prayer of the complaint mentioned

therein. It was true that the widow was the owner

5. in fee simple of the portion which she claimed. (1

R. S. 1852, p. 248, §27, §2652 Burns 1901, §2491 R. S. 1881.) Except during a second or other subsequent marriage she could convey it and grant a good and indefeasible title thereto as against the children (*Avery v. Akins, supra*); but by the statute in force at the time of the rendition of the decree, and at the time of the conveyance to the appellant, she was rendered absolutely incapable of alienating the real estate. The children of the marriage by virtue of which she held the portion as widow

6. had no existing title in her portion at the time of the rendition of the decree or at the time of the conveyance made during the marriage, but they

7. were proper parties to the suit for partition as owners of the remainder of the land to be partitioned.

While it is proper, and by the statute (§1201 Burns 1901, §1187 R. S. 1881) is required, that in the petition for partition the rights and titles of the parties in-

8. terested be set out, and it is true that title may be put in issue in such a suit, yet it is well settled that no question as to the quieting of title as between the parties is involved, unless such question is appropriately presented for adjudication by the pleadings. In the case here in question the decree was rendered upon default.

9. There was no pleading except the petition, and it does not appear that there was any averment therein showing that any party other than the widow was claiming any title or interest adverse to her in the portion of the real estate to which she asserted her title upon which she relied for partition. §1082 Burns 1901, §1070 R. S. 1881; *Irvin v. Buckles* (1897), 148 Ind. 389; *Thompson v. Henry* (1899), 153 Ind. 56; *Miller v. Noble* (1882), 86 Ind. 527.

It is to be presumed that the title was not in issue (*Green v. Brown* [1896], 146 Ind. 1), and the averments in the

answer that it was a suit to quiet title, and that

10. Mary La Forge sought to determine and quiet her title and asked that it be quieted, and that the title of Mary La Forge was in issue in the complaint and cause cannot avail to overthrow such presumption. The only effect of the proceeding was to allot to Mary La Forge

and to put her in possession in severalty of a definite

11. portion of the land owned by her in fee simple as widow, leaving her, as to such portion, subject to the statute forbidding alienation thereof during her subsequent marriage, and casting it upon the children of the former marriage if she should die during her subsequent marriage.

In the second paragraph of answer it is sought to defend as to the two-eighths part of the land so set off to the widow, upon the ground that Oliver M. Long and Emily J.

12. Boswell, two of the eight children of the former marriage, with Joseph S. Boswell, the husband of Emily, joined with Mary La Forge and her husband in the deed of conveyance to the appellant Martin Pence, and that said two children of the former marriage were then each over the age of twenty-one years; it being claimed that the persons so joining and the appellee as their assignee were by the deed in which they so joined estopped to claim any interest in the land.

In the third paragraph the appellant sought to defend as to the two-eighths part of the land upon the same grounds as in the second paragraph, and as to another two-eighths part he sought to defend on the ground that said Joseph S. Boswell, who was the husband of one of the children of the former marriage with whom he had so joined in the conveyance of Mary La Forge and her husband to this defendant, had purchased from others of said children the undivided two-eighths part of the land after the death of Mary La Forge, which before the commencement of this suit said Boswell had conveyed to the ap-

pellee, it being claimed that because Boswell had so joined in the conveyance made by Mary La Forge and her husband, he and his grantee were estopped thereafter to claim any interest in the real estate. The amendatory statute of 1879, *supra*, as above shown, contains a provision that "such widow and her living husband may alienate such real estate, if her children by the marriage in virtue of which such real estate came to her shall all be of the age of twenty-one years and join in such conveyance." If this proviso be applicable under the circumstances of this case, then, to render valid the conveyance, all the children must have arrived at majority and all of them must join in the conveyance. This plainly is the only method of alienation permitted in such case; if any substantial part of the requirements of the proviso be lacking, the conveyance is void as provided in the former part of the section.

If the widow had, as we have stated, title in fee simple, the children had no existing interest. It is not shown of any of the conveyances mentioned in any of the

13. paragraphs of answer that it was made by warranty deed, without which an after-acquired title would not be affected. See *Horlacher v. Brafford* (1895), 141 Ind. 528; *Pond v. Wood* (1903), 32 Ind. App. 28.

If it be sufficiently shown in the fourth paragraph of answer that the appellee procured his title to the five-eighths part of the land by fraud practiced upon his

14. grantors, of which they or their privies might take advantage, this could not avail the defendant Martin Pence, a stranger to the transaction whose conduct was not influenced thereby and who made no claim under or through the persons defrauded. The title which passed from the owners of the five-eighths part of the land to the appellee, though fraudulently procured from them by him, and therefore voidable by them, could not for such reason be avoided or treated as invalid by the defendant Martin Pence claiming under another grantor. As against him

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the title fraudulently obtained by a conveyance not disaffirmed from the true owners was sufficient. *Steeple v. Downing* (1878), 60 Ind. 478; *Ashmead v. Reynolds* (1891), 127 Ind. 441.

All the paragraphs of answer were insufficient. Decree affirmed.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY v. HARRIS.

[No. 5,661. Filed May 18, 1906.]

1. TRIAL.—*General Verdict.*—*Answers to Interrogatories to Jury.*—*Conflict.*—Where there is not an irreconcilable conflict between the answers to the interrogatories to the jury and the general verdict, the latter prevails. p. 78.
2. CARRIERS. — *Railroads.* — *Platforms.* — *Approaches.* — *Care Required.*—Railroads are required to use ordinary care only in keeping their platforms and approaches in a safe condition for passengers. p. 78.

From Clark Circuit Court; *William C. Utz*, Special Judge.

Action by Lloyd Harris against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

M. Z. Stannard and *Ward H. Watson*, for appellant.

H. W. Phipps and *L. A. Douglass*, for appellee.

COMSTOCK, J.—This cause has been twice tried. This is the second appeal. The first trial resulted in a judgment for appellant in pursuance of a peremptory instruction in its favor. That judgment was reversed. This court held that the trial court erred in taking the case from the jury, and remanded the cause for a new trial. *Harris v. Pittsburgh, etc., R. Co.* (1904), 32 Ind. App. 600. The second trial resulted in a verdict and judgment in favor of appellee for \$1,500.

The errors assigned are the action of the court in overruling appellant's motion for judgment on the answers to the interrogatories returned by the jury, notwithstanding the general verdict, and in overruling appellant's motion for a new trial.

The facts specially found at the last trial substantially agree with the statement of the evidence in the opinion on the first appeal. In that opinion it was held, under

1. the facts proved, that the questions at issue should be submitted to the jury. The opinion makes a further statement of the facts and the pleadings unnecessary here. We find no irreconcilable conflict between the special findings and the general verdict, and the motion for judgment thereon was therefore properly overruled.

One of the causes stated in the motion for a new trial was the giving of certain instructions to the jury at the request of appellee.

"Instruction 1. I instruct you that it is the duty of a railway company engaged in carrying passengers to exercise the highest degree of care consistent with the

2. operation of its railroad, in providing reasonably safe means for passengers to enter and depart from their cars and depot; and the passenger, in using a platform in order to enter or depart from the train, has the right to presume that the same is reasonably safe, and he can only be charged with negligence when the defect, if any, is such as would naturally suggest to one of common understanding that it is dangerous, and such as to place one in peril who uses the same."

"Instruction 4. A carrier of passengers is held to the highest degree of care, skill and diligence while engaged in carrying, taking aboard or discharging passengers from its trains and premises, and it is liable for the slightest neglect in this respect to one who is injured without fault on his part."

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The objection to the first instruction is the expression, "the highest degree of care" under the circumstances stated, and to the fourth, that it asserts that a carrier of passengers is held to the highest degree of care, skill and diligence, etc., and that it is "liable for the slightest neglect in this respect." Railroad companies are not required to exercise the highest degree of care in keeping and maintaining their station platforms and approaches for the use of passengers in boarding and alighting from trains, but are only required to exercise ordinary care for such purpose. *Pennsylvania Co. v. Marion* (1885), 104 Ind. 239; 1 Fetter, Carriers of Passengers, §47, and note 2, p. 99; *Palmer v. Pennsylvania Co.* (1888), 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252; *Lafflin v. Buffalo, etc., R. Co.* (1887), 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Conroy v. Chicago, etc., R. Co.* (1897), 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419.

The objection is well taken because the expression "reasonably safe" applies to the condition and not to the means by which that condition should be created and maintained. The degree of care specified in the first instruction is repeated in the fourth, and inferentially was made to apply to the appellant's platform, in stating that "the slightest neglect in this respect" renders the company liable to one who is injured without fault on his part. We are not warranted, in view of the evidence, in concluding that these instructions were harmless. For this error the judgment is reversed, with instructions to sustain appellant's motion for a new trial. The other questions may not arise upon another trial.

THE STATE v. SHELTON.

[No. 6,135. Filed May 18, 1906.]

1. STATUTES.—*Criminal Law.—Intoxicating Liquors.—Illegal Sales.—Holidays.*—Section 2194 Burns 1901, §2098 R. S. 1881, did not prohibit the sale of intoxicating liquors on any holidays except those specifically mentioned therein. p. 83.
2. SAME.—*Holidays.—Commercial Paper.—Intoxicating Liquors.*—Section 7531 Burns 1901, Acts 1891, p. 394, designating certain days as legal holidays with reference to commercial paper, did not designate such days as holidays with reference to the sale of intoxicating liquors. p. 84.
3. SAME.—*Holidays.—Intoxicating Liquors.—Police Power.*—The legislature has the power to designate holidays; and under the police power it may prohibit the sale of intoxicating liquors on such days. p. 86.
4. SAME.—*Construction.—Meaning of Words.*—The words of a statute will be given their ordinary meaning, unless the context shows that they were used in a different sense. p. 87.
5. WORDS AND PHRASES.—*“Holiday.”*—The word “holiday” means a consecrated day; a day of cessation from ordinary labor. p. 87.
6. STATUTES.—*Title.—Limitations.—Construction.*—Where the title of an act limits the act to certain purposes, such act will be construed as effective only as limited thereby. *State v. Atkinson*, 139 Ind. 426, distinguished. p. 87.
7. SAME.—*In Pari Materia.*—Statutes, concerning the same subject-matter, passed at the same session, will be construed *in pari materia* if possible. p. 88.
8. SAME.—*Holidays.—Intoxicating Liquors.—Illegal Sales.—“Labor Day.”*—Under the act of 1905 (Acts 1905, p. 196) making “labor day” a legal holiday, and the act of 1905 (Acts 1905, pp. 584, 721, §579) prohibiting the sale of intoxicating liquors on “any legal holiday,” it is a crime to sell intoxicating liquors on “labor day.” p. 89.
9. POLICE POWER.—*Protection of Private Right.—Public Policy.*—Enlightened public policy and a quickened public conscience demand that on holidays when people congregate in large numbers they shall be safeguarded in their private rights by the prevention of the doing of those things which are liable to incite riots and create discord. p. 89.

From Hancock Circuit Court; *Edward W. Felt*, Judge.

Prosecution by the State of Indiana against Curtis Shelton. From a judgment quashing the indictment, the State appeals. *Reversed*.

Charles W. Miller, Attorney-General, *William C. Geake*, *C. C. Hadley*, *H. M. Dowling* and *C. L. Tindall*, for the State.

Binford & Walker, for appellee.

WILEY, J.—Appellee was charged with the unlawful sale of intoxicating liquor, and on his motion the affidavit upon which the prosecution was predicated was quashed. The State appeals, and relies for reversal upon the action of the court in sustaining the motion to quash. The affidavit is as follows: “Charles L. Tindall, being duly sworn, upon his oath says that at the county of Hancock, State of Indiana, on September 4, 1905, one Curtis Shelton did then and there unlawfully sell to one Charles Piper, at and for the price of five cents, one pint of malt liquor, to wit, beer, to be drunk as a beverage, said September 4 then and there being the first Monday of September, and a legal holiday in the State of Indiana, commonly called and designated ‘Labor day,’ and a day on which the sale of intoxicating liquors was prohibited by law, contrary to the form of the statute made and provided and against the peace and dignity of the State of Indiana.”

The point of contention between the learned Attorney-General and counsel for appellee is that the former affirms and the latter deny that Labor day is a legal holiday. To maintain their respective contentions they both rely upon the act of March 4, 1905 (Acts 1905, p. 196, §7531 *et seq.* Burns 1905). The title of that act is as follows: “An act concerning legal holidays, the maturity of negotiable instruments, creating a Saturday half-holiday for banking institutions in certain cities, repealing all laws in conflict herewith, and declaring an emergency.”

Section one of the act provides: "That the following days, to wit: The first day of the week, commonly called Sunday, the first day of January, commonly called New Year's day, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day; any day appointed or recommended by the President of the United States or the Governor of the State of Indiana as a day of public fasting or thanksgiving; the twenty-second day of February, commonly called Washington's birthday; the thirtieth day of May, commonly called Memorial day; the first Monday of September, commonly called Labor day, and the day of any general, national, or state election, shall be legal holidays within the State of Indiana. And when any of said holidays (other than Sunday) comes on Sunday, the Monday next succeeding shall be the legal holiday."

Section two of the act authorizes banks, trust companies and safety deposit institutions in all cities of more than thirty-five thousand inhabitants to close their doors for business at 12 o'clock, noon, on each and every Saturday, and that every Saturday in the year after 12 o'clock noon "shall, in addition to the legal holidays mentioned in section one of this act, be a legal half-holiday for such banks, trust companies and safe deposit institutions and the business thereof."

Section three of the act provides that promissory notes, etc., shall be payable at the time fixed therein, without grace, and that when the day of maturity falls upon Sunday or a legal holiday the instrument shall be payable on the next succeeding business day. Also that negotiable instruments falling due on Saturday shall be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday.

By section four all laws and parts of laws in conflict with the provisions of this act are repealed.

We have given the substance of sections two and three, because of appellee's contention that the days specified in section one are holidays only for the presentment and payment of commercial paper and that the "presumption is that it was not intended that such days be made legal holidays for any other purpose," and hence that Labor day, upon which appellee is charged with having sold intoxicating liquors, is not a day upon which the sale of such liquors is prohibited by §579 of the act approved March 10, 1905 (Acts 1905, pp. 584, 721, §2226 Burns 1905).

The title of the act just cited is: "An act concerning public offenses." It will be observed that the two acts to which we have referred were passed at the same session of the legislature and, in point of time, in the order mentioned. Section 579, *supra*, is as follows: "Whoever shall sell, barter or give away, to be drunk as a beverage, any spirituous, vinous, malt, or other intoxicating liquors, upon Sunday, the Fourth of July, the first day of January, the twenty-fifth day of December, * * * Thanksgiving day, * * * or any legal holiday, or upon the day of any state * * * election, * * * or between the hours of 11 o'clock p. m. and 5 o'clock a. m., shall, on conviction, be fined," etc.

It is urged by counsel for appellee that the section just quoted is substantially a reenactment of §2194 Burns 1901, §2098 R. S. 1881, which designated certain days

1. upon which the sale of intoxicating liquors was prohibited, and that Labor day was not one of the days designated. That section did prohibit the sale of intoxicating liquors on "any legal holiday." As to the sum and substance of §579, *supra*, and §2194, *supra*, counsel are right in suggesting that they are substantially alike. When the latter section was enacted, Labor day had not

been designated as a holiday, and for that reason no mention was made of it.

It is further insisted that the act of 1905, relating to legal holidays, etc., repealed a very similar act (§7531 Burns 1901, Acts 1891, p. 394), and that the act

2. of 1905 does not include any days as holidays which are not mentioned in the statute which it repealed.

In view of appellee's contention it will be instructive to review the history of the legislation culminating in the act of 1905.

In 1875 the legislature designated certain days as holidays for certain purposes. 1 R. S. 1876, p. 637, Acts 1875, p. 66. The title of that act is as follows: "An act in relation to promissory notes, bank checks, and bills of exchange, and to designate the holidays to be observed in the presentment, acceptance, and payment of the same, and declaring an emergency." That act specifically names Sunday, New Year's day, Christmas, Fourth of July and Thanksgiving day, and provides that they "shall be holidays within the State of Indiana for all purposes of presenting for payment or acceptance for the maturity and protest * * * of bills of exchange * * * and all notes * * * falling due or maturing on either of said holidays, shall be deemed as having matured on the day previous." The intention of the legislature is clearly expressed both in the title of the act and in its body, and that was that the days specified should be holidays for commercial purposes and no other.

In *Ruge v. State* (1878), 62 Ind. 388, appellant was indicted for selling intoxicating liquors on the Fourth of July, and it was charged that the Fourth of July was a legal holiday. It was held that he was not liable because the statute to which we have just referred did not make it a legal holiday for any purpose, except for the presentation, payment, etc., of commercial paper.

In 1889 (Acts 1889, p. 101), the legislature amended the act of 1875. The title to the amendatory act is as follows: "An act to amend an act entitled 'An act in relation to promissory notes, bank checks and bills of exchange, and to designate the holidays to be observed in the presentment, acceptance and payment of the same, approved March 16, 1875, and declaring an emergency.'" The act of 1875, by the act of 1889, was amended by adding May 30, February 22, and the "day of any general, national or state election," as additional holidays, "for all purposes of presenting for payment" checks, promissory notes, etc., and providing further that when any of said holidays shall come on Monday, all bills of exchange, etc., shall be deemed as having matured on Saturday previous, and further that when such holidays come on Sunday, the day following shall be the holiday.

Again in 1891 (Acts 1891, p. 394, §7531 Burns 1901), the legislature amended the act of 1889. The title of the amendatory act of 1891 is as follows: "An act to amend an act entitled 'An act in relation to promissory notes, bank checks and bills of exchange, and to designate the holidays to be observed in the presentment, acceptance and payment of the same, approved March 16, 1875, and declaring an emergency, and amended March 5, 1889, the same being §5517 of the revised statutes of 1881, and declaring an emergency.'" The only amendment in 1891 was by adding the first Monday in September, commonly known as Labor day.

We have given a résumé of all the legislation designating what days shall be deemed to be holidays.

Until the act of 1905, *supra*, the holidays specified by the previous acts were all associated with the maturity and payment of commercial paper.

Counsel for appellee rely largely upon the case of *State v. Atkinson* (1894), 139 Ind. 426, to support their conten-

tion that Labor day is not a legal holiday within the meaning of §2194 Burns 1901, §2098 R. S. 1881, which forbids the sale of intoxicating liquors on "any legal holiday." The decision in that case, as applied to §7531, *supra*, is unquestionably correct, and if there had not been additional legislation on the subject it would be of controlling influence here. That was a prosecution for selling intoxicating liquor on May 30, and it was urged by the State that that was a legal holiday for all purposes under the act of 1891, *supra*. Referring to the act the court said: "It does not purport to constitute the 30th of May a general legal holiday. The act, upon its face, purports to be an act in relation to commercial paper, and it makes the 30th of May, and the other days therein named, legal holidays in relation to such paper, and for no other purpose."

The titles to the several acts to which we have referred, as well as the provisions of the acts, make it so plain that the days specified therein had relation to the maturity, presentment, etc., of commercial paper, that it will not admit of legitimate debate.

Holidays for any and all purposes are creatures of legislative enactment, and when the legislature has designated a specific day as a legal holiday, it has the authority,

3. under the police power of the State, to prohibit the sale of intoxicating liquor on such day. It has the same authority to prohibit the sale of liquor on a legal holiday as it has to prohibit its sale between the hours of 11 o'clock p. m. and 5 o'clock a. m. The question for us to determine here is whether the legislature has designated Labor day as a general holiday. If it has, then the inhibition of the statute against the sale of intoxicating liquor on "any legal holiday" applies. The title of the act of 1905 (Acts 1905, p. 196, §7531 *et seq.* Burns 1905) embraces three subject-matters, and the act itself treats of such matters in three distinct sections. Section one designates cer-

tain days, including Labor day, as legal holidays. It makes no exceptions or restrictions. It does not declare them holidays for any specific purpose, but does declare them holidays in plain and unambiguous language, and such language is broad and general in terms.

It is the rule of construction that when a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be held to mean

4. what its words have plainly expressed, and consequently no room is left for construction. *Case v. Wildridge* (1853), 4 Ind. 51; *United States v. Fisher* (1805), 2 Cranch 358, 2 L. Ed. 304; 26 Am. and Eng. Ency. Law (2d ed.), 598. The best rule by which to arrive at the meaning and intention of the law is to abide by the words which the lawmakers used. Wharton's Digest, 569; *Gardner v. Collins* (1829), 2 Pet. 58, 7 L. Ed. 347. Where there is nothing in an act to indicate that a word or phrase is used in a particular or technical sense, it will be interpreted with its ordinary and popular meaning at the time of the passage of the act. *Massey v. Dunlap* (1896), 146 Ind. 350.

"Holiday means first, a consecrated day, a general festival; and second, a day on which the ordinary occupations are suspended; a day of exemption or cessation

5. from work; a day of festivity, recreation, or amusement." 15 Am. and Eng. Ency. Law (2d ed.), 512. It follows that a "legal holiday" is a day designated and set apart by legislative enactment for one or more of the purposes indicated.

Recurring again to the act of 1905, last cited, it is clear that two classes of holidays are created. Section one designates certain days as "legal holidays," and makes no

6. restrictions or limitations. It is complete in itself. Section two declares that every Saturday, after 12 o'clock noon, in cities of more than thirty-five thousand inhab-

itants, "shall, in addition to the legal holidays mentioned in section one of this act, be a legal half-holiday for banks," etc. Section three provides for the presentment, payment, etc., of negotiable instruments, which mature on "Sunday or a legal holiday." The titles of all the acts previous to the act of 1905, as well as the acts themselves, have plainly and unequivocally indicated that the days named as legal holidays were made such for commercial purposes and not otherwise. Not so with the act under consideration.

The case of *State v. Atkinson*, *supra*, upon which appellee relies, arose and was decided upon a statute, radically different from the act of 1905. There the title of the act under which the prosecution was waged limited the act to specific and certain purposes, and by the decision it was simply held, in harmony with the general rule of statutory construction, that the act could go no farther than the scope of the title. That case is clearly distinguishable from the one under consideration, and hence is not authority here. The rule is that where the title of the act limits its effect to certain things, the act itself cannot extend beyond such limitation. *Dixon v. Poe* (1902), 159 Ind. 492, 60 L. R. A. 308.

Section 579 of the new criminal code (Acts 1905, pp. 584, 721, §2226 Burns 1905) was passed at the same session as the act fixing certain days as "legal holi-

7. days," and subsequently to it. If we are right in our construction of section one of the act approved March 4, 1905, designating certain days as "legal holidays" for all purposes, then §579 of the act approved March 10, 1905, must be construed in connection with it, for the rule is that statutes enacted at the same session of the legislature are to be construed *in pari materia*, so as not to render absurd or meaningless any part of either, and so as to give full effect to both, if possible.

The evident purpose of the legislature in enacting §579, *supra*, was to prohibit the sale of intoxicating liquors on

“any legal holiday.” It having made the first

8. Monday of September a “legal holiday” it would be meaningless and absurd for it to prohibit such sales on any “legal holiday,” if it did not intend the inhibition to extend to all of them alike. As we have seen, holidays are creatures of statutory enactment, and hence we only have such holidays as have been designated by the legislature. Under the plain wording of the present statute, there is no more reason for saying that the Fourth of July is a “legal holiday” than that the first Monday in September is also a “legal holiday.” The legislature has placed them in the same category, and has made no distinction between them. The phrase “legal holiday” occurs in both statutes, and such phrase in the latter would be absolutely meaningless if it could not be applied to the former.

By custom, prior to the enactment of the statute of 1891, the first Monday in September had been designated and set apart as a day of festivities and celebration in honor

9. of labor. The twenty-fifth of December, for nearly two thousand years, has been observed by the Christian world as a day of rejoicing and praise, and is held sacred in memory and honor of the birth of the meek and lowly Nazarene. By custom it became a festal day, and by law a legal holiday. In memory and love of him who “was first in war, first in peace, and first in the hearts of his countrymen,” February 22, the day of his birth, has been observed by the American people who have honored and loved, and who still honor and love, the name and memory of George Washington.

Since 1776, we as a people, have recognized each recurring Fourth of July as the Nation’s natal day, and in some appropriate manner have celebrated that great event in history, which gave to us our national independence, and marked the birth of a new republic on the western hemisphere.

Ever since 1868, when the soldier-statesman, General John A. Logan, Commander in Chief of the Grand Army of the Republic, by proclamation, designated May 30 as a memorial day, in memory of those brave, courageous and patriotic men who gave their lives and services in defense of our country, its institutions and the flag, and who saved to us the Republic, we, as a grateful people, have united with one accord in memorial services of both the dead and living, in due appreciation of their deeds and valor.

Yet none of these days to which we have referred were holidays until made so by statute. We recognize in this country the value and importance of labor. It forms the basis of our wealth, progress and prosperity. We look to it, as the fountainhead of our strength and stability. In designating the first Monday in September, "commonly called Labor day," as a "legal holiday," the legislature paid a just compliment and conferred upon labor a merited honor.

This in an age of progress. The public conscience is quickened. We are tending to a higher civilization. The lines are tightening about those who in any manner would corrupt private and public morals. When any day is set apart for public rejoicing, harmless festivities, and celebrations, and the people congregate for such purposes, they are entitled to every protection that the law can throw about them, to the end that they may devote themselves to the purposes of the day, uninfluenced by any thing that may tend to deprive them of their rights, or inflame their passions. So when the representatives of labor meet annually to celebrate Labor day, they are entitled to the same protection of the law, as that which is extended to all citizens who congregate on any day set apart by statute as a legal holiday, for the purpose of commemorating any great event. The legislature doubtless had this in mind when it made Labor day a legal holiday, and made it unlawful to sell intoxicating liquors on any legal holiday. There is

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greater danger of riot, and a stronger tendency to dissipation, when the masses congregate, than when they are in pursuit of their daily vocations. It is, therefore, in the interest of the public, and the welfare of society, that on such occasions the temptations that breed riot and dissipation should be as far removed from the people as possible. The days specified in the statute are generally observed by the citizens of this State, and the legislature has wisely and timely declared that the traffic in intoxicating liquors shall be suspended on such days. The legislature having thus spoken, it is the duty of the court to enforce the law as it is written.

Judgment reversed, and the trial court directed to overrule the motion to quash the affidavit, and for further proceedings in harmony with this opinion.

DUNNING v. LAKE ERIE & WESTERN RAILROAD COMPANY.

[No. 5,619. Filed May 18, 1906.]

CARRIERS.—Railroads.—Passenger Alighting from Moving Train.

—*Contributory Negligence.*—A passenger who, in the darkness, alights from a moving train without any effort to ascertain its speed and sustains injuries thereby, where sufficient time was given for her to alight while the train was stopped, is guilty of such contributory negligence as precludes a recovery.

From Howard Superior Court; *B. F. Harness*, Judge.

Action by Rosa C. Dunning against the Lake Erie & Western Railroad Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

W. C. Overton, for appellant.

John B. Cockrum and *George Shirts*, for appellee.

ROBINSON, J.—Action by appellant to recover damages for personal injury sustained in alighting from a train.

Answer, general denial. Trial, verdict for appellant for \$500, and also answers to interrogatories. Appellee's motion for judgment on the answers to interrogatories sustained.

Appellant's assignment of errors presents the question of the correctness of the court's ruling in sustaining appellee's motion for judgment on the answers to interrogatories. Appellee assigns cross-error that the complaint does not state facts sufficient to constitute a cause of action.

The complaint avers facts showing that appellant was rightfully a passenger from Denver to Kokomo; that when the train stopped at Kokomo she immediately and with diligence attempted to get off; that the train was a long, heavily-loaded passenger-train, and appellee had negligently failed to provide a sufficient number of servants to assist passengers to get off and on the train, or to see that all passengers were off the train before starting, and negligently failed to have any conductor, brakeman or other person to assist passengers to get off, or to see when they were off the car, or to hold back passengers who were getting on the car until all passengers were off; that by reason of such failure, as soon as the car stopped and before passengers could alight, the passengers who were intending to get on the car began to get on, and obstructed the aisles and steps, and greatly impeded passengers who were alighting; that the employes did not stop the train "longer than about one and one-half or two minutes, as near as plaintiff can say," and did not hold the train long enough for passengers to alight, taking into consideration the crowded condition of the car and the number of passengers getting on and off the same, and started the train not knowing whether all passengers had alighted, and well knowing that the train had not been kept waiting long enough for all passengers to alight and before they had all alighted, and before appellee had time to or could get off; that "when plaintiff went to step off of said car she saw and knew that

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said train was moving, but at said time it was night, and she was confused and agitated by her efforts to push through the crowd and rush of passengers getting on said car and coming into the same, and she was not accustomed to estimating the speed of moving trains; that when she went to step from said car it was running smoothly and without jar, and therefore she thought and believed that said train was moving, and the same appeared to her to be moving very slowly, and she believed that she could easily and with safety step from the car; that in reality defendant's servants in charge of said car and train had started the same rapidly, and when she went to step off said car was moving as near as plaintiff can say at the rate of three or four miles per hour, and with such rapidity that, on alighting, she was thrown" to the pavement and injured.

In answer to interrogatories the jury find that after the train stopped appellant started to get off, and upon reaching the platform thought of her umbrella which she had left in the car, and went back into the car to get it. In answer to questions as to how long the train stopped, the rate of speed it was moving when she stepped off, and whether, if appellee had not returned for her umbrella, she could easily and safely have alighted from the car while the same was not in motion, and whether the train stopped long enough for appellant to have alighted if she had alighted when she first reached the platform, and had not gone back into the car, and whether she could have alighted with safety while the train was stopped had she not gone back, the jury answered: "Not sufficient evidence." The jury further answered: (7) That appellant's parents were passengers in the same coach with her and that when the train stopped they all preceded her to the platform to get off, and that the parents alighted safely before the train was started. (8) That if appellant had alighted with her parents instead of returning for her umbrella she could have done so in safety while the car remained standing; that the train

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had run about sixty-five feet from the station before appellant alighted. (11) "Did the train on which the plaintiff was a passenger stop long enough at the station at Kokomo to allow passengers, including the plaintiff, to alight therefrom in safety? A. No." The jury further answered that appellant made no effort to ascertain the speed of the train at the time she stepped off; that in alighting from the train she had her skirts in one hand and her purse in the other, and that without taking hold of the hand-rail or other support stepped directly and straight out from the train.

The answers to the interrogatories show that appellant was guilty of contributory negligence. The complaint avers that the train had stopped one and one-half or two minutes; that before she alighted the train had again started, which she knew; that it was in the night-time; that when she went to step from the car it was running smoothly; that she thought and believed the car was running very slowly, and she believed she could safely alight. The answers show that if appellant had not gone back into the car she could have alighted with safety while the train was standing; that she made no effort to ascertain the speed of the train at the time she stepped off; and that having parcels in both hands and without taking hold of the hand-rails or other support she stepped directly and straight out from the train. When appellant reached the car steps the train was leaving the station, which she knew. It was at the time dark, which she knew. It must be said that to attempt to leave the train at the time she did and in the manner she did was dangerous. Practically the same question here presented has been decided adversely to appellant. See *Toledo, etc., R. Co. v. Wingate* (1895), 143 Ind. 125; *Pennsylvania Co. v. Hixon* (1894), 10 Ind. App. 520.

The theory of the complaint seems to be, and it is so stated in appellant's brief, that the injury resulted by reason of the failure of appellee's servants to stop the train a sufficient time to enable appellant to alight in safety at the

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station. But the answers to the interrogatories show that appellee was not guilty of this specific negligence. It is expressly found that she was with her parents who alighted safely from the car, and that if appellant had alighted from the car with her parents, instead of returning for her umbrella, she could have done so in safety while the cars remained standing. The answer to interrogatory eleven is not necessarily in conflict with the answers to seven and eight. The last two interrogatories relate exclusively to appellant, and are upon the question of whether she had time to get off the train, while interrogatory eleven relates to appellant and also to all other passengers in the train. If appellant had time to alight from the car in safety while it was standing and did not do so, she cannot complain that the train did not stop long enough for all the other passengers to alight.

Judgment affirmed.

**SIEGMUND v. KELLOGG-MACKAY-CAMERON
COMPANY.**

[No. 5,502. Filed May 29, 1906.]

1. **MECHANICS' LIENS.—Notice.—Signature.**—A notice of a lien for materials furnished in the erection of a house, signed in the name of the lienor by his attorney, is sufficient. p. 97.
2. **SAME.—Notice.—Contents.**—It is not necessary in a notice for a lien for materials furnished in the construction of a house to state more than that such lien is claimed for materials furnished in the construction of such house. p. 97.
3. **SAME.—Heating Plant.—Completed Building.**—A lien may be enforced for the furnishing of materials for the installation of a heating plant in a hotel building. p. 97.
4. **PLEADING.—Complaint.—Mechanics' Liens.—Basis of Suit to Foreclose.**—The contract between the material man and the contractor of a building is not the basis of a suit for the fore-

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closure of a lien in favor of such material man and an exhibit thereof is not necessary in the complaint. p. 98.

5. **ASSIGNMENTS.**—*Choses in Action.*—*Balance Due on Building Contract.*—An unaccepted order by the contractor to the owner of a building for such owner to pay a balance due such contractor to the plaintiff, is not an assignment of such amount. p. 98.
6. **MECHANICS' LIENS.**—*Additional Materials.*—A material man furnishing materials for the installation of a heating plant is entitled to a lien for all materials furnished, though notice of such lien was filed after sixty days from the completion of the original contract, where additional material was furnished for the completion of the entire improvement within sixty days prior to such notice. p. 100.

From Kosciusko Circuit Court; *Lemuel W. Royse*, Judge.

Suit by the Kellogg-Mackay-Cameron Company against John F. J. Siegmund. From a decree for plaintiff, defendant appeals. *Affirmed.*

C. W. Watkins, for appellant.

Lou W. Vail and *Charles A. Wehmeyer*, for appellee.

BLACK, J.—The appellee sued the appellant to foreclose a material man's lien on certain real estate. The appellant's demurrer to the complaint for want of sufficient facts was overruled. After averments showing the appellant's ownership of the real estate described, in the county wherein the cause was commenced, it was alleged that the appellant, December 1, 1900, was erecting thereon a new hotel building, and on or about that date contracted with Charles H. Maloney and Edward Collins, partners doing business under the firm name of Maloney & Collins, to erect, construct and install a heating plant in and as a part of that building, and to do the plumbing, gasfitting, piping and draining in and as a part of the building, for which he agreed to pay said partners \$1,200, Maloney & Collins to furnish all necessary material therefor; that on or about December 22, 1900, Maloney & Collins and the appellee

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entered into a contract by which the latter was to furnish the materials for this work in that house, to be used by Maloney & Collins in its construction; that from this date and divers dates thereafter until January 4, 1901, in pursuance of said agreement, the appellee furnished radiators, piping, heaters, fittings, supplies and other materials for the construction of said work in and as a part of said building, of the value of \$486.23, a bill of particulars of which was filed with the complaint and made part thereof, which materials, it was alleged, were used by Maloney & Collins in the construction of the building. It was further alleged that March 2, 1901, and less than sixty days after the materials were furnished, the appellee filed, in the office of the recorder of that county, a written notice of his intention to hold a lien, etc., which was on that date recorded in, etc., the notice being made an exhibit. Other averments need not be recited for the purposes of our decision of the cause.

The notice of claim of lien filed in the recorder's office and exhibited with the complaint was signed in the name

of the appellee by a certain attorney. This was a

1. sufficient signing. *Jeffersonville Water Supply Co.*

v. *Riter* (1897), 146 Ind. 521. In the portion of the notice purporting to state for what the lien for a specified amount was claimed, it proceeded as follows: "For work and labor done and materials furnished by us in the erection and construction of said house," etc. It was not necessary to state in the notice that the lien was claimed for the installation of a heating plant, or to state more particularly for what the lien was

2. claimed. If it be the intention of counsel in referring to this portion of the notice to criticise the complaint upon the ground that a lien may not be had for materials furnished for the installation of a heating

3. plant in a hotel as a part of the building, as described in the complaint, we cannot agree with such a construction of our statute.

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All other references to the complaint in the brief or the argument of counsel for the appellant relate properly to the question as to the sufficiency of the evidence, which question is presented also in the motion for a new trial.

It appeared in the evidence that the contract referred to in the complaint as a contract between the appellant and Maloney & Collins was an agreement in writing.

4. It seems to be thought by counsel for appellant that this contract was the foundation of the action. It is claimed that the complaint was upon an oral contract, and that as the contract shown in evidence was written the finding was not sustained by sufficient evidence. The suit was one for the enforcement of the lien on the real estate, and no personal judgment was sought or rendered against any one. It was necessary to show in the complaint that the materials were furnished for the doing of something contemplated by a contract, express or implied, with the owner of the interest which it was sought to subject to the lien; but the appellee was not a party to that contract and the persons with whom the owner contracted were not parties to the action, which was not founded upon any contract in the sense of the statute providing that when a pleading is founded on a written instrument it must be filed with the pleading. The lien which it was sought to foreclose was obtained, not by contract, but by compliance with the statute.

A contract in writing between the appellant and Maloney & Collins was made in November, 1900, for the construction of the heating apparatus, the latter to furnish

5. all materials, etc., for \$1,200, seventy per cent thereof to be paid on completion of the work and the balance to be paid March 1, 1901, the work to be completed by January 1, 1901. The materials were ordered from time to time by Maloney & Collins from the appellee during the month of December, 1900. While the work was in progress in that month the appellant, by oral agreement

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with Maloney & Collins, caused the latter to provide for heating an additional room, not specified in the written contract, and the materials therefor were in the same month ordered by the contractors from the appellee, and it shipped them to the contractors January 4, 1901, and they were thereafter in that month used for such purpose. The appellant paid Maloney & Collins, January 5, 1901, \$716.31, and the contractors gave their written receipt to the appellant, of that date, for that amount "on contract." About a week thereafter the contractors gave to the appellee a written order, not dated, addressed to the appellant and signed by the contractors. Before the order was a written memorandum in the form of an account thus: "To contract, \$1,200. By cash, \$716.31. Balance, \$483.69." The annexed order, in the body thereof, was as follows: "Please pay above balance to Kellogg-Mackay-Cameron Company, Chicago, and charge to our account."

The notice of lien was filed in the office of the county recorder March 2, 1901, for \$486.23, which was the amount due the appellee for the materials so furnished and used in the work done by the contractors for the appellant. It does not appear that the appellant at any time accepted the order above mentioned or agreed with any one to pay the appellee; and no evidence has been brought to our notice of any agreement for the release of the contractors because of the giving of this order for a sum less than the amount of the materials furnished. If it may properly be said that the material man would be precluded from suing for the foreclosure of the lien alone, without setting up, as the foundation of the action, the written contract between the owner and the principal contractor, in a case where, after the furnishing and use of the materials and before the filing of the notice of lien, that contract has been duly assigned to the material man, yet we do not regard the unaccepted order above mentioned as constituting an assignment of that contract.

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It has been contended here that the notice of claim of lien, as to the greater portion of the amount claimed, was not filed within sixty days after the furnishing of

6. the materials, within the meaning of the statute. Although a small portion of the materials furnished within the statutory period consisted of articles for doing work not contemplated when the original contract was made, yet the court was authorized to find from the evidence that this extra work constituted, so far as the appellee was concerned, a portion of one entire improvement, for which it was furnishing materials, for all of which it was entitled to acquire a lien without reference to the state of the account between the original contractor and the owner of the building, at whose instance and request the substantially continuous work thereon was done.

Judgment affirmed.

TERRE HAUTE & LOGANSFORT RAILWAY COMPANY v. SALISBURY.

[No. 5,622. Filed May 29, 1906.]

1. RAILROADS. — *Rights of Way.* — *Fences.* — *Liens.* — Under the statutes (§§5323-5325 Burns 1901, Acts 1885, p. 224), providing that railroad companies must fence their rights of way so as to turn stock and "may" use barbed wire, and in case of failure the abutting landowner may erect same and retain a lien therefor, such landowner may recover for a fence made of woven wire with two barbed wires at the top, though such fence was costlier than barbed wire. p. 101.
2. NEW TRIAL. — *Evidence.* — *Sufficiency.* — *Railroads.* — *Fences.* — *Attorneys' Fees.* — Evidence showing that defendant railroad company refused to build a fence along its right of way; that plaintiff, after giving notice, built such fence; that defendant failed to pay therefor; that plaintiff brought suit; that his complaint was signed by his attorney; that such attorney represented plaintiff in all the proceedings in court and that a reasonable attorney's fee was a certain amount, sustains a finding for plaintiff for attorney's fees. p. 103.

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3. **RAILROADS.**—*Fences.—Attorneys' Fees.—Statutes.—Validity.*
 —The statute (§§5324, 5325 Burns 1901, Acts 1885, p. 224), providing for the recovery of attorneys' fees in the foreclosure of liens for fencing railroad companies' rights of way, is valid. p. 103.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Action by Thomas N. Salisbury against the Terre Haute & Logansport Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Guenther & Clark and *John G. Williams*, for appellant.
Joseph Combs, for appellee.

ROBINSON, J.—Suit by appellee to recover for rebuilding a fence along appellant's right of way. Trial and judgment in appellee's favor.

Overruling appellant's motion for a new trial is alone relied upon as error. It is argued that the court erred in overruling the motion for a new trial (1) because the uncontradicted evidence shows that the value of the fence constructed by the appellee was in excess of the value of a fence such as, under the law, appellant was required to build; (2) because appellee was not entitled to recover attorneys' fees, in the absence of proof that he had employed an attorney to enforce the collection of the value of the fence constructed.

(1) Sections 5323-5325 Burns 1901, Acts 1885, p. 224, §§1-3, provide that railway companies shall fence their tracks where they can be fenced, which fence

1. "may be constructed of barbed wire, on both sides of such railroad throughout the entire length, * * * sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs, or other stock from getting on such road;" and, upon the neglect or failure of the company to build or repair such fence, the adjoining landowner, after giving thirty days' notice of his intention to do so, may rebuild or repair the same and collect from the company the expense thereof, including material and labor, together with

reasonable attorneys' fees. The statute does not provide the kind of fence that shall be built, further than that it shall be sufficient and suitable to turn cattle, horses, mules, sheep or hogs or other stock, and that the fence "may be constructed of barbed wire." If the company itself build the fence it may construct it of barbed wire, or it may build it of other material, the only requirement is that it be sufficient and suitable to turn stock as specified. It is not claimed that the fence appellee built was not sufficient and suitable to turn stock, nor is it claimed that the material used was not worth what appellee paid for it, nor that any more material was used than was necessary; but it is claimed that the fence constructed is a more expensive fence than the statute requires to be built. Appellee testified that the fence built by him was of woven wire, with two barbed wires at the top, the whole from fifty to fifty-two inches high, with cedar posts. It appears from the evidence that the fence was about the ordinary height, and that it was properly constructed, but the argument is that a cheaper fence could have been constructed that would have satisfied the statutory requirement.

The statute does not contemplate that the fence required shall be built as a temporary structure, but that it shall be built and maintained along the right of way so long as the land is used as a railroad right of way. There is evidence to show that a barbed wire fence sufficient to turn stock could be built for less money than it cost to build the fence in question, but there is also evidence to show that the fence built by appellee, considered in the nature of a permanent improvement, is the cheaper fence of the two. It is no doubt true that a fence might be built by a landowner under this statute that would be unreasonably expensive, but the evidence in the case at bar does not make such a case. While there is evidence that a fence sufficient to turn stock could have been erected for from twenty to twenty-five cents less per rod, there is also evidence to show that, con-

sidering the place and purpose of the fence, such a fence as that built by appellee is within the purpose of the statute.

(2) Evidence was introduced that a reasonable attorney's fee would be \$36, but it is argued that the record fails to show that appellee had employed an attorney, or

2. had become liable to an attorney for reasonable compensation in the prosecution of this action. The record shows that appellee gave the statutory notice to appellant, that appellant failed to build the fence, that appellee did build it, that appellant failed to pay him the expenses of building it, and that he brought suit to recover the amount. Appellee's complaint is signed, "Joseph Combs, attorney for plaintiff." Through all the proceedings leading up to the trial and throughout the trial appellee was represented in court by the same attorney. The record sufficiently shows that appellee had employed counsel. *Smiley v. Meir* (1874), 47 Ind. 559, 562.

The statute provides that the claimant in such case may recover a reasonable attorney's fee. It is true that a contract for the payment of attorneys' fees is upheld

3. on the ground that they are a reasonable indemnity against loss actually and necessarily occasioned by the failure to pay; but in this case the record shows that it became necessary for appellee to bring suit to collect his claim, and the record also shows that as between appellee and his counsel appellee was liable to his counsel for the reasonable value of his services in prosecuting the claim. There is no conflict in the evidence that the attorney's services were reasonably worth \$36, the amount allowed by the court. It is expressly held that this provision of the statute authorizing the recovery of attorneys' fees, in addition to the value of the fence constructed, is valid. *Terre Haute, etc., R. Co. v. Salmon* (1903), 161 Ind. 131. See, also, *Terre Haute, etc., R. Co. v. Salmon* (1905), 34 Ind.

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App. 564; *Terre Haute, etc., R. Co. v. Erdel* (1904), 163 Ind. 348; *Terre Haute, etc., R. Co. v. Earhart* (1905), 35 Ind. App. 56.

Judgment affirmed.

LITTLER ET AL. v. ROBINSON.

[No. 5,653. Filed May 29, 1906.]

1. TRIAL.—*General Denial.—Burden of Proof.*—Where defendant enters a general denial to plaintiff's complaint, the burden is upon plaintiff to prove the material allegations of his complaint. p. 108.
2. APPEAL AND ERROR.—*Trial.—Incompetent Evidence.*—The Appellate Court will not disturb a judgment resting upon incompetent evidence admitted without objection. p. 108.
3. EVIDENCE.—*Parol.—Real Property.*—The location of real property may be proved by parol, and, if there be no objection, title to real property may be so proved. p. 108.
4. NEW TRIAL.—*Insufficient Evidence.—Title.*—Evidence showing that defendant owned a farm about two miles north of a certain place; that it was the only farm he owned; that he leased a part of his lands for oil and gas purposes and that the transfer records showed that he owned lands in the section claimed, sustains a finding that defendant owned a part of the southeast quarter of section twenty-eight, township twenty-three north, range nine east. p. 108.
5. LIENS.—*Laborers'—Foreclosure.—Title.*—In order to foreclose a laborer's lien against the owner of lands for work in drilling a gas-and-oil well it is necessary to show that such owner or his agent employed plaintiff to do such work. p. 109.
6. NEW TRIAL.—*Foreclosure of Laborers' Liens.—Personal Judgment.*—In a suit to foreclose a laborer's lien it is erroneous to render a personal judgment against the owner of land where such owner did not employ plaintiff to do the work sued for. p. 109.

From Wells Circuit Court; *Edwin C. Vaughn*, Judge.

Action by Melvin D. Robinson against Joseph W. Littler and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

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Dailey, Simmons & Dailey, for appellants.

A. R. Long, W. H. Eichhorn and G. A. Matlack, for appellee.

MYERS, J.—This is an action instituted in the Grant Circuit Court by appellee against appellants and George M. Catterson, and the Matthews Drilling Company, to recover for work and labor performed in drilling a natural gas or oil well, and to foreclose a mechanic's lien on the land on which the well is located. The venue was changed to the Wells Circuit Court, where the cause was tried by the court, and personal judgment rendered against all the defendants for \$176.50, and judgment foreclosing a mechanic's lien as to all interest or title of each of the defendants to the land. A complaint in one paragraph and separate denials by appellants formed the issues. The other defendants defaulted.

The complaint in substance avers, that on January 14, 1904, appellant Joseph W. Littler was, and still is, the owner of certain described real estate in Grant county; that appellant William H. Huffman, then operating under an oil-and-gas lease from said Littler, contracted with Catterson and the Matthews Drilling Company to drill a gas or oil well upon said land; that on said day appellee and Catterson entered into a contract by which appellee agreed to work on said well for \$5 per day; that his services were of that value; that he worked on the well for thirty and one-half days, and the same was not completed within that time; that on February 9, 1904, and within sixty days after said labor was performed, appellee filed in the recorder's office of Grant county a notice of his intention to hold a lien upon said land, as well as upon the well, pipe, casing and tubing, for the amount of his claim; also averring the amount due, and that it is unpaid. A description of the real estate is given, and a bill of particulars and copy of the notice is made a part of his complaint by exhibits. The

complaint also contains averments relative to the collection of attorneys' fees for his attorneys in the foreclosure of said lien.

The overruling of the separate motion of each appellant for a new trial is assigned as error, and the only questions presented for our decision arise under this assignment. Both motions are based upon the same reasons, and are as follows: (1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law.

The evidence shows a notice of a mechanic's lien filed by appellee, directed to the Matthews Drilling Company, George M. Catterson, Joseph W. Littler, William H. Huffman, and all others concerned, whereby appellee gave notice of his intention to hold a mechanic's lien on the southeast quarter of section twenty-eight, township twenty-three north, range nine east, in Grant county, Indiana; also on the drilling machine on the land, as well as upon the oil-wells, pipes, casing, tubing and pipe-lines connected thereto, recently erected thereon by the Matthews Drilling Company and William H. Huffman, for the sum of \$151.50, for work and labor done and materials furnished by him in the erection and construction of said well, etc. Appellee testified that he was acquainted with William H. Huffman, Joseph W. Littler and George M. Catterson, and that Catterson was connected with the Matthews Drilling Company; that under an employment by Catterson he worked thirty and one-half days on an unfinished well located on the land of Joseph W. Littler; that his work was that of a driller, and he had charge of the tools used in drilling the well; that while he had no special contract with Catterson or the Matthews Drilling Company as to the price he was to receive per day for work on that particular well, he was in their employ, and had been receiving \$5 a day, and, without anything being said to the contrary, he went on

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with this work; that his services were fairly worth \$5 per day; that for his services on that well he received \$1, and that \$151.50 was due and unpaid; that the well was drilled on the farm on which Littler resided; that Littler owned no other land in that section; that the work of appellee was performed on well No. 2, and was the only well drilled on that farm by the Matthews Drilling Company; that he was unable to state the section, township and range in which said farm was located, but that it consisted of about 160 acres, and was located about two or two and one-half miles north of the town of Matthews. W. D. Friend, a witness, testified as to the value per day of appellee's services. A. R. Long, a witness, testified that he was acquainted with Joseph W. Littler, and located the Littler farm about two miles north of Matthews; did not know what section it was in, but thought it was the only land Littler owned in that county, and contained about 159 acres.

A statement from the county auditor of Grant county was introduced in evidence. By this statement such officer certifies that the transfer books of Jefferson township, Grant county, Indiana, showing the transfers of the real estate in that township for the years 1880 to 1885, inclusive, show the "S. E. fractional 28-23-9-146.60 acres" in the name of Joseph W. Littler, "and that the title of said land, as shown above, has been so carried and transferred in the name of Joseph W. Littler, from each succeeding record of transfers from time to time, until this date, and now remains of record in the name of said Joseph W. Littler on the transfer books in my office. In testimony, * * * October 21, 1904." Following the above certificate, an oil-and-gas lease, of date October 15, 1896, was introduced in evidence. This lease is from Joseph W. Littler and Sarah E. Littler to William A. Walley, duly acknowledged and recorded February 22, 1897, in the recorder's office of Grant county, Indiana, describing land situated in Jefferson township, Grant county, Indiana, as

the east half of the southeast quarter of section twenty-eight, township twenty-three north, range nine east. The record also shows an assignment of this lease by Walley to the Consumers Gas Trust Company, which assignment was duly acknowledged and recorded February 22, 1897, in miscellaneous record No. 19, Grant county, Indiana. The above is substantially all the evidence given in this cause.

I. In considering the question of the sufficiency of the evidence to support the decision of the trial court, it is to be remembered that the general denials placed upon

1. appellee the burden of proving all the material allegations of his complaint by competent evidence. *City of LaFayette v. Wortman* (1886), 107 Ind. 404, 409.

But if such allegations be proved by incompetent evidence, admitted without objection, due credit will be given such proof on appeal. *Graves v. State* (1889), 121

2. Ind. 357; *Pichon v. Martin* (1905), 35 Ind. App. 167.

If no objection be interposed, ownership of real estate may be proved by parol (*Uhl v. Moorhous* [1894], 137 Ind. 445), and the location of real estate may be

3. established by parol (*McKeen v. Haskell* [1886], 108 Ind. 97).

(a) Appellant insists that there is no evidence to show that Littler owned the real estate described in the notice of lien. Keeping in mind that this court can con-

4. sider only questions of law, and that such questions, on the sufficiency of the evidence, only arise when there is no evidence to support an essential fact upon which the decision of the court rests, we are of the opinion that inferences of fact may be drawn from the evidence in this case warranting us in ruling against appellants in this particular. *Botkins v. State* (1905), 36 Ind. App. 179.

But, in order to sustain a judgment foreclosing the fee-simple title, it was necessary for appellee to show, not only

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that Littler owned the real estate described in the

5. notice of lien, that an oil or gas well was drilled thereon, and that he performed work and labor in drilling such well, but he must further show that the well was being drilled pursuant to some authority emanating from the owner of the land or his agent, or, as in this case, some traceable connection between Catterson and Littler, whereby the well was drilled in pursuance of a contract, either expressed or implied, by the latter. *Coburn v. Stephens* (1894), 137 Ind. 683, 45 Am. St. 218; *Adams v. Buhler* (1888), 116 Ind. 100; *Ogg v. Tate* (1875), 52 Ind. 159; *Colter v. Frese* (1873), 45 Ind. 96, 101; *Clark v. Maxwell* (1895), 12 Ind. App. 199.

There is absolutely no evidence in this case showing that Littler, either directly or indirectly, by agent or otherwise, authorized Catterson or the Matthews Drilling Company to go upon his land and sink a well. There is no evidence showing that Littler had any knowledge that a well was drilled on his land. True, the evidence exhibits a lease from Littler to Walley and by Walley assigned to the Consumers Gas Trust Company, but there is not the slightest evidence that the trust company contracted with Catterson or the Matthews Drilling Company or with any one else for a well upon the Littler land. Therefore, under the evidence in this case and the well-settled law as announced in the several cases last-above cited, we must conclude that the decision of the court as to Littler is not sustained by sufficient evidence.

(b) There is no evidence connecting appellant Huffman with the transaction.

II. Appellants contend that the judgment is contrary to law, and this contention must be sustained. The court rendered a personal judgment against both these appel-

6. lants. The theory of the complaint does not authorize a personal judgment against either of these parties. As stated by appellant, the complaint proceeds

upon the theory that appellant Littler owned certain real estate described in the mechanic's lien; that appellant Huffman, operating under an oil-and-gas lease from said Littler, contracted with the defendants, Catterson and the Matthews Drilling Company, to drill a gas or oil well upon said land, and that said Catterson employed appellee to do certain work upon said well. From these facts it is clearly apparent that the pleadings in this case do not authorize the judgment as rendered against these appellants.

Judgment reversed, with instructions to the trial court to sustain the motion of each appellant for a new trial.

KORPORAL ET AL. v. ROBINSON ET AL.

[No. 5,638. Filed May 29, 1906.]

1. APPEAL AND ERROR.—*Appellate Court Rules.—Waiver.*—A failure by appellant to comply with Appellate Court rule twenty-two is a waiver of an alleged error. p. 111.
2. DEEDS.—*Description.—Lands Included.*—A quitclaim deed of fifty acres off of the south side of a tract of land includes an eighty-foot strip off of the south side thereof theretofore conveyed to a railroad company "for the purpose of constructing thereon and maintaining a railroad and appurtenances thereto." p. 111.
3. SAME.—*Quitclaim.—Notice.*—A quitclaim deed conveys only the interest of the grantor in the described lands, and is notice to the grantee of a defective title. p. 113.
4. BOUNDARIES.—*Surveys.—Evidence of Title.*—An official survey by a county surveyor is *prima facie* evidence of the corners and lines so located. p. 114.

From Grant Superior Court; *B. F. Harness*, Judge.

Suit by Charles Robinson and others against Mary L. Korporal and another. From a decree for plaintiffs, defendants appeal. *Affirmed.*

A. E. Steele, Simon & Chiles and *T. B. Dicken*, for appellants.

St. John & Charles, for appellees.

MYERS, J.—This is a suit by appellees against appellants to quiet title, and in ejectment, and for damages for the wrongful detention of a strip of land eighty feet wide. The complaint is in two paragraphs, and a general denial to each formed the issues. Trial, finding and judgment for appellees, quieting their title to the land in dispute, giving immediate possession of the same, and adjudging a recovery from appellants of \$25 damages.

Overruling appellants' motion for a new trial is the only error assigned. Appellants have waived this error by failing to comply with rule twenty-two, clause five, of

1. the supreme and this court. *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435; *Security, etc., Assn. v. Lee* (1903), 160 Ind. 249; *Boseker v. Chamberlain* (1903), 160 Ind. 114; *Rush v. Kelley* (1905), 34 Ind. App. 449. However, as appellees are not insisting on this advantage, and to some extent have supplied certain omissions in appellants' brief, the controlling question in this case may be considered.

From the record and briefs in this case we learn that on September 4, 1894, Patrick Kiley became the owner of the following real estate in Grant county, Indiana,

2. to wit: The east half of the northwest quarter, and eighteen acres off of the west side of the northeast quarter, all in section sixteen, township twenty-five, range nine east. On September 12, 1894, Patrick Kiley and his wife conveyed by quitclaim deed to the appellant Mary L. Korporal a part of said land described as follows: "Fifty acres of equal width throughout off of the south end of the following described real estate, to wit: The east half of the northwest quarter, and eighteen acres off of the west side of the northeast quarter, all in section sixteen, township twenty-five north, range nine east, containing in both tracts ninety-eight acres, more or less." On May 19, 1880, appellant Mary L. Korporal was the owner of an undivided interest in said real estate first-above described, and on that

date she and her husband, Anthony Korporal, joined with all the other owners of said land in a release and quitclaim deed to the Frankfort, St. Louis & Toledo Railway Company, for a "strip of land forty feet wide on each side of the center of said railroad track, as the same shall be finally located over and across the following described land, to wit," etc. After describing certain lands, including the land described in the Kiley deed, there is this proviso: "Provided, however, that the lands hereby granted shall be used for the purpose of constructing thereon and maintaining a railroad and appurtenances thereto." The consideration stated in this deed was \$1. Said railway company accepted said deed and took possession of an eighty-foot strip of land off of the south end of said ninety-eight-acre tract, and constructed a railroad, and have ever since maintained a railroad thereon. On March 8, 1899, Kiley, by warranty deed, conveyed to appellees said ninety-eight-acre tract, "excepting therefrom, however, fifty acres of equal width throughout off of the south end of the above-described real estate, the same being heretofore deeded to Mary L. Korporal." The record further shows that about two years after the deed was executed from Kiley to Mrs. Korporal, an attempt was made to determine the north boundary line of the fifty-acre tract, and certain measurements were made and a fence constructed on what was then supposed to be her north line. Prior to May 1, 1902, this line again became a subject of question, and at the request of appellees, and after the statutory notice had been given appellant Mary L. Korporal, and pursuant to such notice, on May 1, 1902, the county surveyor of Grant county proceeded to make a survey of said lands, and then and there established the corners and line dividing the land of appellants and the land of appellees. Thereafter, and on the line thus established by the county surveyor, a wire partition fence was constructed, appellants building the east half and appellees the west half, and possession of the lands as thus divided

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was accordingly taken by the parties. About one year after the building of this fence, and in the night-time, and prior to the bringing of this action, appellants moved the fence last constructed eighty feet north, and took possession of said eighty-foot strip of land, to the exclusion of appellees.

Appellants argue that the eighty-foot strip of land occupied by the railway company ought not to be considered as a part of the fifty-acre tract conveyed to Mrs. Korporal by Kiley, as was done by the surveyor. In our opinion appellants' contention is erroneous. The deed of Kiley to Mrs. Korporal contained no covenants of warranty. It in no manner refers to the land occupied by the railway

3. company. By it Kiley conveyed only such title and interest as he then had in the fifty acres off of the south end of the tracts therein described. *Condit v. Maxwell* (1897), 142 Mo. 266, 44 S. W. 467; *Arlington Mill, etc., Co. v. Yates* (1898), 57 Neb. 286, 77 N. W. 677; *Nidever v. Ayers* (1890), 83 Cal. 39, 23 Pac. 192; *Montgomery v. McCumber* (1891), 128 Ind. 374, 377. In the case last cited it is said: "The quitclaim deed only passes the title held by the grantor at the time of the conveyance." Citing authorities.

There is no claim of fraud or deception anywhere in this transaction, and each of the parties to this action is claiming title through the same source. It is agreed that that part of the ninety-eight-acre tract, including the strip occupied by the railway company, and south of the line so established by the county surveyor, contains fifty acres. This being true, and applying the law, as we understand it, to the facts here exhibited, it is unnecessary, in the decision of this cause, for us to determine the character of the title held by the railway company. At the time Mrs. Korporal received her deed from Kiley, the railway company had constructed and was operating its railroad over that portion of the ninety-eight-acre tract by virtue of an instrument in writing, to which appellants were parties, and which in-

strument was duly recorded in the records of deeds of Grant county. The very form of her deed was sufficient to put her upon inquiry as to the character of the title she was thereby receiving, and of itself notice that she was getting only a doubtful title. *Meikel v. Borders* (1891), 129 Ind. 529, 533; *Smith v. Rudd* (1892), 48 Kan. 296, 29 Pac. 310; *Wright v. Tichenor* (1885), 104 Ind. 185.

The facts in this case also show that the line between the land of Mrs. Korporal and appellees was established by the county surveyor of Grant county after due notice

4. to appellant Mrs. Korporal. The parties to this action accepted and acted upon the line so established by building a wire fence thereon. This survey stands unappealed from and in full force and effect, and must be taken at least as *prima facie* evidence of the correctness of the corners so established, as well as the boundary line between their lands. *Main v. Killinger* (1883), 90 Ind. 165; *Waltman v. Rund* (1887), 109 Ind. 366; *Sinn v. King* (1892), 131 Ind. 183; *Hunter v. Eichel* (1885), 100 Ind. 463.

It is true, in this action appellees must recover upon the strength of their own title. The uncontradicted facts show that appellees, by virtue of their warranty deed from Kiley, became, and were at the time of the commencement of this action, the owners in fee simple of the entire ninety-eight-acre tract, except fifty acres off of the south end thereof, theretofore conveyed to Mrs. Korporal, and taking the north line of the fifty-acre tract, as located by the county surveyor, as being *prima facie* correct, and it being admitted that the land in controversy lies north of this line, the facts and the law are with the appellees.

Judgment affirmed.

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INDIANAPOLIS NORTHERN TRACTION COMPANY
v. HARBAUGH.

[No. 5,639. Filed May 29, 1906.]

1. **APPEAL AND ERROR.—Complaint.—Conclusions of Law.—When Same Questions Presented.**—Where the special findings show the same facts as alleged in the complaint an exception to the conclusions of law presents the same questions as a demurrer to the complaint. p. 116.
2. **PLEADING.—Complaint.—Torts.—Covenants.—Interurban Railroads.—Killing Stock.**—A complaint against an interurban railroad company for damages for permitting oil and paint to remain upon its premises, whereby plaintiff's cow was killed, is in tort and is not founded upon a breach of its covenant to keep its right of way fenced. p. 116.
3. **APPEAL AND ERROR.—Pleading.—Theory of.—Briefs.**—The Appellate Court may refer to the entire record and the briefs of counsel to determine the theory of a pleading. p. 117.
4. **INTERURBAN RAILROADS.—Deeds.—Covenants.—Breach.—Landlord and Tenant.—Evidence.**—The tenant of the grantee of lands bordering on an interurban railroad right of way may maintain an action against such company for wrongfully permitting oil and paint to remain exposed on its rights of way, thereby killing his cow, and support same by evidence of a contract by his landlord's grantor whereby such company agreed to fence such right of way. p. 117.
5. **TRIAL.—Conclusions of Law.—Exception.—When Taken.—Appeal and Error.**—An exception to the conclusions of law taken at the time of stating such conclusions is sufficient to question same on appeal, though such conclusions were not stated until after the overruling of the motion for a new trial, such exception being an admission that the facts were fully and correctly found. p. 120.
6. **COVENANTS.—Executory.—Running with the Land.**—A contract by an interurban railroad company to fence its right of way runs in favor of the lessee of the covenantee's grantee and such company is liable to him for the death of his cow caused by its failure to fence, though such contract was executory and the deed to such right of way, therein contracted for, had not been executed. p. 121.

From Howard Superior Court; *B. F. Harness*, Judge.

Action by Philip Harbaugh against the Indianapolis Northern Traction Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

James A. Van Osdol and Blacklidge, Shirley & Wolf,
for appellant.

John W. Cooper and Thomas S. Gerhart, for appellee.

MYERS, J.—Appellee in the court below instituted this action against appellant to recover damages for the death of a cow, averred to have been poisoned by drinking oil and eating paints. It is conceded that the cause was tried upon the second paragraph of the amended complaint. A demurrer to this paragraph was by the court overruled, and this ruling is here assigned as error. So far as any question for our consideration is concerned, a general denial formed the issue. The cause was tried by the court, special findings of fact made and conclusions of law stated thereon, and judgment in favor of appellee for \$63.

(1) We have carefully examined the amended paragraph of the complaint, also the special findings, and the facts as found by the trial court are in many par-

1. ticulars more favorable to appellant than the facts averred in the complaint. Therefore, except in one particular, which we will hereinafter notice, the error grounded upon the exception to the conclusion of law fully presents the question arising upon such demurrer. *Indiana, etc., Ins. Co. v. Bender* (1904), 32 Ind. App. 287; *Ross v. VanNatta* (1905), 164 Ind. 557, and cases cited.

The particular averment in the complaint, and on which there is no finding, and to which appellant has given considerable attention in its argument, on the theory

2. that it makes the complaint bad, is as follows:

“That said Jones and Jones did on November 1, 1902, in compliance with the terms of said written contract, convey by warranty deed to said traction company, the last-above described tract.” The land to which this averment refers is the tract described in the complaint and sold to appellant. Appellant, in support of its contention, predicates its argument upon the theory that the contract is executory, and therefore not sufficient to create a cove-

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nant running with the land, also that the averment is a mere conclusion, and does not show the covenant to fence was carried forward into the deed, and without the deed, or a copy thereof showing that fact, the complaint is insufficient to withstand a demurrer. If this were an action founded upon the deed, then it would be necessary to make the same, or a copy thereof, a part of the complaint; but, as we construe the pleading, it is built upon the theory of an action to recover damages for the wrongful killing of appellee's cow. We are controlled and supported in our conclusion reached upon this pleading by many decisions. *Toledo, etc., R. Co. v. Fenstermaker* (1892), 3 Ind. App. 151; *Conger v. Chicago, etc., R. Co.* (1854), 15 Ill. 366; *Toledo, etc., R. Co. v. Burgan* (1894), 9 Ind. App. 604; *Lake Erie, etc., R. Co. v. Power* (1896), 15 Ind. App. 179. The facts pleaded determine the theory and legal worth of a pleading. *Balue v. Taylor* (1894), 136 Ind. 368, 373; *Pennsylvania Co. v. Clark* (1891), 2 Ind. App. 146, 151; *Monnett v. Turpie* (1892), 132 Ind. 482. In the case last cited, it is said: "The complaint will, if possible, be given such construction as to give full force and effect to all of its material allegations and such as will afford the pleader full relief for all injuries stated in his pleading."

In this State a court having appellate jurisdiction, and having before it the record in the cause, may refer to "the entire record and briefs of counsel on both sides"

3. in order to determine upon what theory the complaint proceeded. *Carmel Nat. Gas, etc., Co. v. Small* (1898), 150 Ind. 427.

The written contract requiring appellant to fence its right of way before it took possession of the land, as a part consideration for the sale and purchase thereof,

4. imposed upon appellant a duty, which, by the averments of the complaint, it failed to discharge; and if such failure brought about the injury complained

of, and in the manner shown by the complaint, and it being further averred "that said Jones and Jones sold and conveyed by good and sufficient warranty deed to Thomas C. Malaby all the rights and covenants running with the remaining unsold portion of said first-above described land, and especially the covenants of said traction company to said Jones and Jones," and that appellee had leased and was in possession, as a lessee of Malaby, under the ruling of this court in *Toledo, etc., R. Co. v. Burgan, supra*, the paragraph should be held to state a cause of action, and the contract or deed to be proper evidence tending to uphold it. *Lake Erie, etc., R. Co. v. Power, supra*.

(2) The substance of the facts found may be stated as follows: On May 13, 1902, appellant was an Indiana corporation, and on June 15, 1903, was the owner of a line of railway from the city of Kokomo to the city of Logansport, Indiana. On said May 13 Hannah Jones and Silas W. R. Jones were the owners of a certain tract of grazing land in Howard county, Indiana, which was on that date enclosed by a good, substantial fence. On said last date said owners agreed in writing to sell appellant a portion of said tract of land, which instrument, omitting the description of the land sold, is as follows:

"Greentown, Indiana, May 13, 1902.

For three and one-half acres more or less in section twenty-five, township twenty-four north, of range three east, in Howard county, Indiana, I will take \$568.59, upon the following terms and conditions, to wit: The boundary of said land is as follows: [Then follows a description of the land]. I will make warranty deed for same and furnish abstract showing a perfect title to same, and give possession of the same on and after November 1, 1902. The parties buying said land are to build a good, woven-wire fence on the east line of said tract of land, using cedar posts in the construction of said fence, and they are not to take possession of said ground in any manner whatever until said fence is fully completed, and the consideration for

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said land is paid in full. This proposition good and binding on me for ten days from this date.

May 13, 1902, at 5 o'clock p. m.

Hannah Jones.
S. W. R. Jones."

"Kokomo, Indiana, May 23, 1902.

We herewith accept the above proposition of Hannah Jones and S. W. R. Jones, and have this day paid you \$50 to bind said proposition, and will pay balance of money on or before November 1, 1902, or forfeit the \$50 this day paid you.

Accepted at 1:30 o'clock p. m.

Indianapolis Northern Traction Company,
By J. H. Leffler, agent."

On November 10, 1902, Jones and Jones sold and conveyed to Thomas C. Malaby by deed containing covenants of general warranty, a part of said original tract, and abutting the east line of the tract embraced in said agreement. On May 15, 1903, Malaby rented and leased to appellee the tract so purchased from Jones and Jones for grazing purposes, and from said last date to June 15, 1903, he continuously pastured his cow thereon. Prior to the month of May, 1903, but during that year, appellant took possession of the right of way as purchased from Jones and Jones, and begun the construction of its inter-urban railroad over the same, before constructing a fence along the east line of such right of way, and thereafter, and until June 15, 1903, and without any fence on said line, and knowing that cattle were being pastured upon said leased premises, it placed large quantities of materials, such as paints and oils, thereon, as well as on said leased premises, and on said last date had freshly painted trolley poles and large quantities of green paint and oil deposited thereon, which were exposed and unguarded, and which paint and oil were then allowed and permitted to be scattered over and upon the grass growing on its right of way and the premises so leased, without notifying appellee that

it was so using said paints and oils, and appellee had no knowledge that it had or was using the same. Said east line of said right of way is the west line of the premises so leased, and on which line there was no fence. Near the line dividing the land of Malaby and appellant was a board fence, through which Malaby, after receiving his conveyance, had caused an opening to be made large enough to allow cattle to pass through the same, and which opening remained until after the happening of the occurrence herein complained of. By reasonable care appellee could have known of said opening in the fence onto the land where appellant was prosecuting its work and had its paints and oils, but made no effort to prevent said animal from passing through said opening and onto the premises where the paints were situated. Said paints and oils were accessible to appellee's cow only by reason of said opening. Appellee, during all the time he was so pasturing said animal, as aforesaid, knew that appellant was engaged in the construction of its railroad over its premises, west of said fence, and that said road was not completed at the time said animal so ate of said oils and paints, which caused her death.

On November 9, the court filed its special findings. December 15, and at the same term, appellant filed its motion for a new trial, which on the same day was

5. overruled, and appellant excepted. Following this ruling, and on said last date, the record in this cause shows that the court stated and filed its conclusions of law "upon the facts heretofore found and set out in the record." The conclusion reads as follows: "That the plaintiff is entitled to recover from the defendant Indianapolis Northern Traction Company the sum of \$63." To this conclusion of law appellant, at the time, reserved its exception. Thereupon the court rendered judgment in accordance with its conclusion. Appellee insists that no question is presented by the latter exception. Citing

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Dickson v. Rose (1882), 87 Ind. 103, and *Smith v. McKean* (1884), 99 Ind. 101. In those cases it appears that the exception to the conclusions of law was not taken at the time the conclusions were stated, and not until after the trial court had overruled a motion for a new trial. While in the case at bar the record discloses that the exception was taken at the time the court stated its conclusions of law, and is sufficient to raise any question which may be presented thereon. This exception is an admission that all facts have been fully and correctly found. *National State Bank v. Sandford Fork, etc., Co.* (1901), 157 Ind. 10; *Halstead v. Sigler* (1905), 35 Ind. App. 419.

The error assigned on the exception to the conclusion of law presents the controlling question for our decision.

The complaint avers the execution of a deed "in 6. compliance with the contract." As to this averment, the special findings are silent. If it was necessary for appellee to aver and prove the execution of the deed containing covenants to build a fence, as stipulated in the contract, as an ultimate fact, and such fact was not found, this failure would inure to the benefit of appellant, and be a sufficient reason for a reversal. *State Bank v. Backus* (1903), 160 Ind. 682; *Coffinberry v. McClellan* (1905), 164 Ind. 131; *McGrew v. Thayer* (1900), 24 Ind. App. 578.

The court did find that appellant entered into a written contract with the grantor of appellee's lessor to fence its right of way before entering thereon to construct its road, and that the deed to appellee's lessor contained covenants of general warranty. The contract is set out in the findings. Under the findings, our consideration is limited to this contract, and the action of the parties thereto, as evidenced by the facts found. It is argued by appellant that the findings exhibit an executory contract and create only rights *in personam*, and until executed there can be no rights *in rem*. We have no fault to find with this argu-

ment, and if this were an action wholly *ex contractu*, such argument would be exceedingly weighty, but for reasons hereinafter appearing the theory of appellant is not controlling.

The agreement to fence, in the very nature of things, had reference to and is in many essential elements a real covenant. It is the usual covenant contained in grants to railway companies for rights of way and construed by courts as covenants running with the land. It contained no stipulation to make it purely personal. Such covenants may be with respect to the interest in lands granted, or it may be in the interest of that portion not granted or the lands adjacent thereto, depending upon the reasonable intent of the parties as expressed in the contract. *Conduitt v. Ross* (1885), 102 Ind. 166. The stipulation in the contract to fence placed that duty upon appellant, and was in part the consideration for the proposed grant, and, looking to the object and purpose of this feature of the agreement, it will be readily seen that the interest intended to be benefited thereby—by keeping animals off of appellant's right of way and away from danger—was the unsold portion of the land.

The special findings exhibit a valid contract, founded upon a valuable consideration and in full force and effect. Its object is clear. The intention of the parties to be thereby accomplished is plain. While in terms it is executory, yet nevertheless it was the authority by which appellant entered into possession of the land and began and continued the construction of its road. By such possession and acts it must be held to have assumed all the burdens imposed by the authority under which it was acting. One of these burdens, that of building a fence along the east line of its right of way, by the contract is made a condition precedent to its possession for any purpose, but, in violation of such stipulation, it proceeded to construct its road over the land described in the contract and deposited

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thereon and exposed poisonous substances, which, by reason of its neglect to fence, became and were accessible to appellee's cow, which poisonous substances she ate and thereby became poisoned and died.

The court in *Conduitt v. Ross*, *supra*, refers to the case of *Bally v. Wells* (1769), 3 Wils. 25, and quotes: "When the thing to be done, or omitted to be done, concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant."

Appellant argues, and it is the law, that executory contracts to convey terminate with the execution of the deeds, and the rights of the parties are to be determined by the latter, the presumption being that the deeds give expression to the final purposes of the parties. *Flanders v. Chicago, etc., R. Co.* (1892), 51 Minn. 193, 53 N. W. 544; *Turner v. Cool* (1864), 23 Ind. 56, 85 Am. Dec. 449; *Clifton v. Jackson Iron Co.* (1889), 74 Mich. 183, 41 N. W. 891, 16 Am. St. 621; *Close v. Burlington, etc., R. Co.* (1884), 64 Iowa 149, 19 N. W. 886. But where the parties are proceeding under such executory contract containing a covenant, evidently for the benefit of the remaining portion of the land, and no deed having been executed in the performance of such contract, it would seem to us that its provisions, under all the facts in this case, should and does extend to cover the damages sought to be recovered by this action.

In 3 Elliott, Railroads, §1188, it is said: "Where a railway company obtains a right of way through a farm, and in consideration of the grant of such right of way agrees to erect and maintain secure fences, it is bound to pay for animals killed or injured by its trains in cases where the animals come upon the track through the fault of the company in failing to erect fences according to the terms of its contract. Such agreement when recited in the condemnation proceedings or the instrument by which the railway company obtains its right are charges which run

with the land and are binding upon the company even after the landowner has conveyed to subsequent grantees.”

In *Gulf, etc., R. Co. v. Washington* (1892), 49 Fed. 347, 1 C. C. A. 286, where damages were sought for cattle killed, it was held that “when a railroad company enters into a contract with a landowner to fence its track through his premises for the protection of his stock, such a contract is obligatory on the railroad company as a statute requiring it to fence its track, and, so far as relates to the question of the liability of the railroad company for stock killed by reason of its breach of such duty, it is precisely what it is when the obligation to fence is imposed by statute.”

The case of *Louisville, etc., R. Co. v. Sumner* (1886), 106 Ind. 55, 55 Am. Rep. 719, was an action to recover damages for hogs killed, as well as other items of damages, occasioned by the neglect of the company to build a fence along its right of way, in violation of a recital in its deed, that such conveyance was made upon the consideration that \$200 was paid, and upon the further consideration that the grantee covenanted “to fence said strip.” It was held that “it must be supposed that the defendant knew, when it made the contract, and in pursuance thereof exposed the plaintiff’s farm to injury by throwing the fields open to the public and rendering it hazardous for him to allow his own animals to pasture where they would be exposed to destruction by the defendant’s trains, that special damages would result. Such damages must, therefore, have been within the reasonable contemplation of the parties when the contract was made. That the duty which the railroad company owed arose by contract did not make the rule for the assessment of damages different from what it would have been if the duty to fence had been imposed by statute.”

In *Toledo, etc., R. Co. v. Burgan* (1894), 9 Ind. App. 604, the landowner executed a deed to the railroad company, and on the same day, by an extraneous contract, the company agreed to fence the right of way so conveyed to

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it "within a reasonable time," and this court in that case said: "The gravamen of the action is to recover damages for injuries sustained by appellee, as tenant of the landowner, on account of the failure of appellant to discharge the duties imposed on it by the contract mentioned and set out in the complaint. * * * The duty of the company was a continuing one running with the land. * * * It is not controverted but that the tenant had the same right of action, if any, that the landowner would have had under the same circumstances."

The court did not err in its conclusion of law.

(3) Appellant also insists that the trial court erred in overruling its motion for a new trial. What we have heretofore said in passing on other questions here presented disposes of all the questions arising and presented by appellant in support of this assignment.

Judgment affirmed.

CITY OF INDIANAPOLIS v. MULLALLY.

[No. 5,634. Filed May 29, 1906.]

1. **PLEADING.—Complaint.—Negligence.—Municipal Corporations.—Streets.—Defects.**—A complaint showing that defendant city knowingly permitted a dangerous hole to remain in a street shows negligence; and an allegation that it "negligently" left such hole open and unguarded is not an additional act of negligence. p. 127.
2. **SAME. — Complaint. — Municipal Corporations. — Defective Streets. — Notice.**—A complaint alleging that plaintiff was driving with due care along a street; that by reason of a dangerous hole's being "left open and unguarded of which he had no knowledge" he fell into same, sufficiently negatives notice of such defect on plaintiff's part. p. 128.
3. **TRIAL.—Instructions.—Assuming Facts.—Municipal Corporations.—Defective Streets.**—An instruction that plaintiff "had a right to assume," in the absence of notice, that the street over which he was traveling was safe and in good repair, is not bad as assuming that such street was in a dangerous condition. p. 128.

4. **TRIAL.—Instructions.—Contributory Negligence.—Burden of Proof.**—An instruction in a personal injury case that the burden of proving contributory negligence is upon defendant and that plaintiff cannot recover if the preponderance of the evidence shows him guilty of contributory negligence is correct. p. 129.
5. **SAME.—Instructions.—Assuming Facts.—Defective Streets.—Question for Jury.**—An instruction that if a hole in the street was full of water, the question whether an ordinarily prudent man would assume that it indicated danger and drive around it, was, with all other proved facts, a question for the jury, is correct. p. 130.
6. **APPEAL AND ERROR.—Weighing Evidence.**—The Appellate Court will not weigh conflicting oral evidence. p. 131.
7. **TRIAL.—Interrogatories to Jury.—Conclusions.**—It is not error to refuse to submit to the jury an interrogatory as to whether the condition of the street, on which the injury occurred, was such as to warn persons of probable or possible danger, since facts and not conclusions should be asked for. p. 131.
8. **MUNICIPAL CORPORATIONS.—Defective Streets.—Notice.—Care Required.—Question for Jury.**—Notice of a defect in a street does not preclude recovery for injuries caused thereby but casts upon plaintiff the duty to use care commensurate with the known danger, and whether he does use such care is a question for the jury. p. 131.
9. **APPEAL AND ERROR.—Appellate Court Rules.—Briefs.**—Appellant's failure to discuss an alleged error is a waiver thereof. p. 132.
10. **SAME.—Judgment.—Death of Party.**—Where the death of a party is suggested, judgment will be rendered as of the date of submission. p. 132.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Edward Mullally against the City of Indianapolis. From a judgment on a verdict for plaintiff for \$2,500, defendant appeals. *Affirmed.*

Henry Warrum, Edward B. Raub and Gideon W. Blain, for appellant.

Addison C. Harris, Francis J. Mattler and Frank C. Cutter, for appellee.

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ROBINSON, J.—Suit by appellee for damages for personal injuries caused by appellant's alleged negligence. Demurrer to complaint overruled. Answer, denial. Trial and verdict for appellee, with answers to interrogatories. Appellant's motions for judgment on the answers, and for a new trial, overruled. Judgment on the verdict.

The complaint avers that a certain street in appellant city, known as Virginia avenue, which was traveled and used by the citizens and public generally, "was negligently allowed to become out of repair, and remained so out of repair an unreasonable length of time, to wit, for about six weeks, and at a point between New Jersey and East streets, on the west side of said Virginia avenue, there was a dangerous hole therein, of which the defendant had notice and failed and neglected to repair the same for the space of about six weeks; that said hole or obstruction, running from near the gutter on the west side in an easterly direction across said avenue, was of the following dimensions, to wit, about six feet long, three feet wide, and six inches deep, on the west side, and was a dangerous obstruction in said street; that the plaintiff was in robust health and engaged in teaming, and was earning from \$18 to \$20 a week with his team; that on the evening of March 6, 1902, at about 5:45 o'clock, he was lawfully driving, with due care, his wagon on said street, and was sitting on the seat of said wagon; that, by reason of said hole's being so negligently left open and unguarded, of which he had no knowledge, accidentally and without fault on his part, said wagon was precipitated into said hole, and he was forcibly thrown onto said street from the wagon" and injured.

The theory of the pleading is that appellant negligently allowed one of its streets to become out of repair and remain so out of repair an unreasonable length of

1. time, about six weeks, that there was a dangerous hole in the street, of which appellant knew and failed and neglected to repair, and into this hole appellee,

without fault, was thrown. It was negligence for the city to permit the street to become and remain out of repair, and this negligence was the proximate cause of the injury. The averment that the hole was negligently left open and unguarded is not an averment of an additional act of negligence. It added nothing to the negligent act of permitting a dangerous hole to be and remain in the street for the space of about six weeks.

It is argued that there is no averment that appellee did not see or know of the hole. It is averred that appellee

“was lawfully driving, with due care, his wagon on

2. said street, and was sitting on the seat of said wagon; that, by reason of said hole's being so negligently left open and unguarded, of which he had no knowledge, accidentally and without fault on his part, said wagon was precipitated into said hole.” The pleading is not as definite in this respect as it should be, but as the theory of the pleading is not one of negligently guarding the hole, we think it fair to conclude that the words “of which he had no knowledge” mean that he had no knowledge of the existence of the hole. It is not the theory of the pleading that the city permitted the hole to remain in the street, and had undertaken to make the place safe by guarding the hole, and at the time in question had negligently left the hole unguarded.

The third instruction is not bad “for the reason it assumes that the street was [not] in a reasonably safe condition.” The instruction assumes nothing about the

3. condition of the street, but correctly says that appellee “had a right to assume, in the absence of notice or knowledge to the contrary, that the street on which he was traveling was in a reasonably safe condition at the time for use as a public street.”

It is argued that instructions six and eight fail to inform the jury that evidence of contributory negligence would

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avail appellant though shown by appellee's own evidence. These instructions are as follows: "(6) If you find that the city negligently suffered the hole to be and remain in the street at the time of the accident, and that plaintiff had no actual knowledge of the existence before the happening of the accident, then he will be entitled to a verdict unless it has been proved by a fair preponderance of the evidence that he was negligent himself in not seeing the hole in time to avoid it. And the burden of proof is upon the city on this point to satisfy the jury that he was not exercising due care for his own safety, and that such conduct on his part contributed towards the happening of the accident." "(8) The defendant insists that the plaintiff himself was guilty of negligence in not avoiding the hole. The burden of proof is on the defendant to establish by a fair preponderance of all the evidence in the case that plaintiff was guilty of negligence contributing to his injury."

The burden of showing that appellee was guilty of contributory negligence rested upon appellant. And it is well settled that it is sufficient if proof of this fact is found in any evidence given by either party or in the evidence given by both parties. The jury were told by the sixth instruction that if the city negligently suffered the hole to remain in the street, and that appellee had no knowledge of its existence, he could recover, unless it was proved by a fair preponderance of the evidence that he was negligent in not seeing the hole in time to avoid it, and that the burden of proof was upon appellant (as to whether he was negligent in not seeing the hole in time to avoid it), to satisfy the jury that he was not exercising due care. The jury were clearly told that the fact to be proved was to be proved "by a fair preponderance of the evidence," which means by a fair preponderance of all the evidence in the case. And in the eighth instruction the jury were expressly told that the burden of proof was on appellant to establish by a fair pre-

ponderance of all the evidence in the case that appellee was guilty of negligence contributing to his injury.

In the ninth instruction the jury were told: "The mere fact that the plaintiff has received injuries does not raise any presumption that he is entitled to recover in this case by reason thereof. On the contrary, he must affirmatively prove that he received the injuries complained of and in the manner described in the complaint; and also that such injuries were received by him as a result of the negligence on the part of the defendant. If he shall establish these two facts he is entitled to recover unless the evidence in the case affirmatively establishes that he himself was guilty of negligence contributing to the accident alleged in which he received such injuries. He is not called upon to establish freedom from contributory negligence; on the contrary, the burden is upon the defendant to establish such contributory negligence, if it existed, but if the evidence offered by the plaintiff establishes negligence upon his part contributing to his injuries the defendant may take advantage thereof, and would not in such case be called upon to offer additional testimony upon that point."

It cannot be said that the sixth and eighth instructions are objectionable on the grounds claimed by appellant. And when construed with reference to each other and in connection with the ninth instruction they could not have misled the jury. See *Huntington Light, etc., Co. v. Beaver* (1905), 37 Ind. App. 4; *Flickner v. Lambert* (1905), 36 Ind. App. 524; *Atkinson v. Dailey* (1886), 107 Ind. 117; *Indianapolis St. R. Co. v. Haverstick* (1905), 35 Ind. App. 281.

The seventh instruction reads as follows: "If the hole in the street at the time of the accident was full of water, this fact may be considered by the jury in deter-

5. mining the question whether plaintiff was using due care. Whether a pool of water at the time and place would have induced a prudent man to assume that it

marked a deep and dangerous hole, and to run around it, is a question which the jury under the evidence may consider, with all the other facts, in arriving at a conclusion on the question of the plaintiff's case." This instruction is not objectionable on the ground that it assumes that the defect complained of was a dangerous hole. In determining the question of appellee's care the jury might consider the fact, if a fact, that the hole in the street was filled with water, and whether such a hole of water would have induced a prudent man to assume that it indicated danger, and induce him to run around it. The instruction may be somewhat ambiguous, but we cannot say that it would be construed by the jury in a way to prejudice appellant's rights.

It is further argued that the evidence shows that appellee was guilty of contributory negligence. The jury found the question of appellee's contributory negligence

6. in his favor, and after reading the evidence we cannot disturb the conclusion reached by the jury without weighing evidence, and this we cannot do.

There was no error in refusing to submit to the jury an interrogatory seeking an answer as to whether the condition of the street was such as to warn persons of

7. probable or possible danger. The interrogatory asks for a conclusion, and not a fact. The jury might properly have been asked to give the condition of the street itself. But if the interrogatory had been submitted, and had been answered in the affirmative,

8. it would not have made the answers irreconcilable with the general verdict, for the reason that a traveler is not necessarily guilty of negligence in attempting to pass over a public street which he knows to be dangerous. In such case he must use a degree of care commensurate with the known danger, and whether he has or has not is a question of fact. See *Board, etc., v. Brown* (1883), 89 Ind. 48; *Henry County Turnpike Co. v. Jackson* (1882), 86

Ind. 111, 44 Am. Rep. 274; *City of Richmond v. Mulhol-land* (1888), 116 Ind. 173; *City of Muncie v. Spence* (1904), 33 Ind. App. 599.

Other questions were reserved, but as they have

9. not been argued, they are deemed waived.

The death of appellee since the submission of

10. this cause having been suggested, the judgment is affirmed as of the date of submission.

RINK v. LOWRY, BY NEXT FRIEND.

[No. 5,655. Filed May 29, 1906.]

1. **APPEAL AND ERROR.—Assignment of Errors.—Demurrer to Complaint in Two Paragraphs.**—An assignment that the court erred in overruling a demurrer to a complaint is not well taken where such complaint is in three paragraphs and one of them is sufficient. p. 135.
2. **PLEADING.—Complaint.—Negligence.—Elevators.**—A complaint showing that the plaintiff, an employe of a telephone company, was requested by defendant to repair his telephone; that while engaged in such work defendant negligently set in motion the elevator, thereby injuring plaintiff, is sufficient. p. 136.
3. **TRIAL.—General Verdict.—Interrogatories to Jury.—Answers.—Conflict.**—The general verdict controls unless the answers to the interrogatories to the jury are in irreconcilable conflict therewith. p. 136.
4. **SAME.—Instructions.—Refusal.—Harmless Error.—Answers to Interrogatories to Jury.**—The giving of an alleged erroneous instruction ignoring the question whether the operator of the defendant's elevator was acting within the scope of his authority when he agreed with plaintiff not to operate the same while plaintiff was at work thereunder, is harmless where the jury's answers to the interrogatories show that he was so acting when he made such promise. p. 137.
5. **SAME.—Instructions.—Refusal.—Answers to Interrogatories to Jury.**—The refusal to give an alleged correct instruction that neglect of duty by defendant will not excuse plaintiff from using his senses is not available error where the answers to the interrogatories to the jury show that plaintiff, with defend-

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ant's knowledge, was working in an elevator shaft where he was required to do his work and where he was required to keep his eyes on his work. p. 137.

6. NEGLIGENCE. — *Elevators. — Operation.* — Where plaintiff was solicited by defendant to repair the telephone batteries situated in the elevator shaft, and, upon the agreement of defendant's elevator operator not to run such elevator, plaintiff began work in such shaft, and while at work such elevator operator started such elevator, thus injuring plaintiff, defendant is liable. p. 138.
7. SAME. — *Licensees. — Evidence. — Inferences.* — An employe of a telephone company in making repairs to defendant's telephone at defendant's request is not a mere licensee, and such request may be inferred from other facts proved. p. 140.
8. MASTER AND SERVANT.—*Servant's Agreeing to Cease Work Until Plaintiff Makes Repairs.*—The operator of defendant's elevator, who agrees with plaintiff to cease running such elevator until plaintiff has completed certain repairs in the shaft thereof, is defendant's servant during such time, and not plaintiff's. p. 140.
9. NEGLIGENCE. — *Contributory. — Upon What Depends.*—Negligence and contributory negligence depend largely upon the facts of each case, all of the circumstances being taken into account. p. 141.
10. SAME. — *Contributory. — Elevators. — Question for Jury.* — Where there was evidence that plaintiff was injured because defendant's servant started defendant's elevator in violation of his agreement with plaintiff not to do so while plaintiff was engaged in making repairs, the questions of negligence and contributory negligence are for the jury. p. 141.

From Superior Court of Marion County (66,553);
Vinson Carter, Judge.

Action by Jean Lowry, by his next friend, against Joseph A. Rink and others. From a judgment on a verdict for plaintiff for \$5,000, defendant Rink appeals. *Affirmed.*

William A. Ketcham and Joseph W. Hutchinson, for appellant.

John H. Kingsbury and Joseph Collier, for appellee.

COMSTOCK, P. J.—Appellee, by his next friend, brought this action against appellant, Joseph A. Rink, one of the

defendants below, and his codefendants, Homer Johnson and the New Telephone Company, for damages for personal injuries received by him.

The complaint was in three paragraphs, in all of which the same general facts are relied on. The defendants each separately filed a demurrer to the complaint, for want of sufficient facts. The separate demurrer of the New Telephone Company was sustained by the court, and, the plaintiff refusing to plead further, judgment was rendered against him as to said defendant. The separate demurrers of the defendants Johnson and Rink were overruled by the court, whereupon the cause was put at issue by general denials. Upon the issues thus joined, the cause was tried by a jury, a verdict returned for \$5,000, together with answers to interrogatories. Each defendant moved for judgment in his favor on the answers of the jury to interrogatories, notwithstanding the general verdict, and filed his separate motion for a new trial, which motion for judgment in his favor and for a new trial, respectively, being overruled, the court rendered judgment upon the verdict against the defendants Rink and Johnson, for the amount of the verdict.

The errors relied upon for reversal are that the court erred (1) in overruling appellant Rink's separate demurrer to the complaint; (2) in overruling the separate motion of Rink for judgment in his favor on the answers of the jury to the interrogatories, notwithstanding the general verdict; (3) in overruling the separate motion of Rink for a new trial.

The first paragraph of the complaint, omitting formal parts and character of injuries, avers in substance that on October 3, 1903, while engaged in the service of, and acting for and as the servant of, defendant New Telephone Company, the plaintiff was, by direction, invitation and allurement of defendant Joseph A. Rink, induced to enter

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upon the premises of Rink, and did go into a certain building thereon for the purpose of making repairs on the telephone battery therein, which battery was used by the defendant Rink under a contract with the New Telephone Company; that said battery was located at the bottom of the elevator shaft in said building, and that to execute the work properly it was necessary to enter the elevator shaft, and that he did enter the shaft for said purpose, but that before he did so he notified defendant Homer V. Johnson, who was the servant of defendant Rink, in charge of the elevator as conductor thereof, that he desired to repair said battery and that it would be necessary to enter the shaft to do so; that the defendant Johnson assured plaintiff that he would not allow said elevator to descend onto him, and would not operate or permit said elevator to be operated so as to injure plaintiff while therein; that, pursuant to said assurances and relying thereon, he entered said shaft to make said repairs, and within five minutes thereafter, while diligently engaged in executing said work, defendant Johnson in charge of said elevator as the servant of defendant Rink, and while discharging the duties of his employment with and acting for and in behalf of defendant Rink, negligently, with knowledge of the perilous position plaintiff was in and that plaintiff would be injured thereby, and without any notice to plaintiff, caused said elevator and the machinery thereof to be set in motion and operated, whereby a part of the machinery, to wit, the counterweight thereof, was precipitated with great force and violence upon and against the plaintiff, injuring him. The complaint concludes with the general charge of negligence of the defendant and that he himself was without contributory negligence.

It is pointed out by the appellee that the assignment of errors challenges the complaint as an entirety, and that therefore, if either paragraph be good, no error is

1. presented by the first specification in the assignment. The assignment is as follows: "The court

erred in overruling the defendant Rink's separate demurrer to the complaint." Under several decisions of the Supreme Court the proposition is true. *Cambridge Lodge v. Routh* (1904), 163 Ind. 1.

It is stated in appellant's brief that the first paragraph alleges that at the time in question plaintiff had been induced to enter upon the premises of appellant by

2. his direction, invitation and allurement; that its general allegation must fail in the face of the subsequent allegation "that he was there as a servant of the New Telephone Company for the purpose of making repairs on the battery of said company, and for no other purpose; that it thus affirmatively appears that he was on appellant's premises solely for his own purposes and was therefore a mere licensee." Another averment is: "And used by defendant Rink under a contract with the New Telephone Company," etc. These averments do not support the claim made, nor can we concede that it appears from any other averments of the paragraph that appellee was on appellant's premises solely for his own purposes. The averments show, in effect, that appellee entered the premises, and upon the work in which he was engaged, at the request of appellant; that the servant of appellant while in the discharge of the duties of his employment and acting for and in behalf of said Rink, negligently set in motion said elevator, thereby injuring appellee, without any fault or negligence on his part. It was sufficient to withstand a demurrer, and the consideration of the other paragraphs, under the rule, is unnecessary.

We have carefully read the interrogatories and the answers thereto, and we find no irreconcilable conflict between them and the general verdict, and the motion

3. to render judgment on them in behalf of appellant was therefore properly overruled.

The objection made to instruction twelve, to quote from appellant's brief, is that it "wholly ignored the question

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as to whether Johnson, at the time he made the

4. agreement with appellee to refrain from operating the elevator while appellee was in the pit, was acting within the scope of his authority. It referred to the agreement as one of the elements of appellee's case, as it undoubtedly was, but it did not instruct the jury that the conclusion announced in the instruction was on the basis that Johnson was acting within the scope of his authority in making the agreement referred to, and that if he was not so acting a different conclusion would follow as to appellant. But on the contrary, the instruction was so worded that it was calculated to lead the jury to the conclusion that the court was instructing them that Johnson's agreement was binding upon appellant." The instruction is lengthy and we do not deem it necessary to insert it here in its entirety. Interrogatories fifty-two and fifty-three and answers thereto are as follows: "(52) At the time defendant Johnson assured plaintiff that he would not operate the elevator while plaintiff was in the shaft, was said Johnson acting for and in behalf of defendant Rink, and was he acting as said Rink's servant in the line of his employment in that particular? A. Yes. (53) Was defendant Johnson, at the time he set said elevator in motion and operated it, engaged in the service and discharge of the duties of his employment as servant, agent and employe of his codefendant, Joseph A. Rink? A. Yes." The instruction did not, therefore, mislead the jury and appellant was not harmed thereby. Elliott, App. Proc., §642; *Morgan v. Jackson* (1904), 32 Ind. App. 169; *Ellis v. City of Hammond* (1901), 157 Ind. 267.

Instruction nine refused by the court, if given, would have told the jury "that no neglect of duty on the part of another will excuse a person from using the senses,

5. sight and hearing, where they are available, and that injury, where the use of either of them would have given sufficient warning to enable such person to avoid

the danger, conclusively proves negligence, and that if for any cause one of those senses be rendered unavailable, the obligation to use the other becomes all the stronger." In answer to interrogatory thirty-seven, it is found that the work plaintiff was engaged in required his close attention; in thirty-eight, that it was necessary to keep his eyes on the work in which he was engaged; thirty-nine, that plaintiff's mind was so engrossed with the execution of the work in hand that he did not see or hear the danger until the weight of the elevator struck him. These findings show that he was engaged in proper work, in the only place in which it was necessary to go for this purpose, under circumstances in which he was obliged to keep his eyes on his work, so that if we concede that the instruction requested correctly stated the law, yet when the facts found show that the appellee could not, in the prosecution of his work, have been looking for the weight, its refusal was harmless, conditions existing under which the use of his eyesight was unavailing. The court did not err in refusing said instruction.

The evidence shows that Joseph A. Rink, a defendant below, was on October 3, 1903, the owner and in possession of property on Illinois street, in the city

6. of Indianapolis. He had in his employ his co-defendant Homer V. Johnson, whose duty it was to operate the elevator for the benefit of the tenants of the flat, and any others who might have occasion to use it, and Mallory Miller, janitor, who had general control of the building. The elevator was practically noiseless in its movement up and down in the shaft. Upon his application, the New Telephone Company put in a telephone with the necessary equipments, which was in use at the time in question. The New Telephone Company owned the telephone and all the appurtenances thereof, and it was understood that the telephone company was to keep it in repair, and for that purpose and to that extent appellant herein gave it the privilege of entering his premises whenever any

such repairs were needed. On the date named the telephone company received a request from the Rink flats to repair the telephone. Lowry was in the employ of the telephone company at that time, and was sent to repair it. He had been in the employ of the telephone company about three weeks prior to the accident. Pursuant to the order of Mr. George, wire chief, on October 3, 1903, Lowry went to the Rink flats to repair the batteries. He entered the flat from the front entrance. Homer Johnson was the first one he saw. Johnson was standing in the elevator. Lowry told him his purpose for being there, and Johnson thereupon pointed in the hall to the telephone. Lowry told him it was not the telephone proper, but it was the batteries he wanted to fix, and then Johnson took him to the basement. Both went down in the elevator. Lowry then told him to run the elevator up and hold it and not move it and he would let him know when he came out from under it. Just as Johnson got the elevator out of sight, Miller came up, and Lowry told him what he was going to do and he (Miller) called Johnson by his first name and said: "Homer, don't run the elevator for a few minutes, this young man is going to be working there." Lowry then asked Miller if it was all right to go ahead, and he said: "Yes, that is all right, I often work under there." Miller was not seen any more that day. After Miller had gone Lowry jumped into the pit and started to go to work, but found it was too dark and so got up and called to Johnson and told him he would have to have a light, and asked him for a candle. Johnson came down and got a candle for Lowry, and Lowry told him to run up the elevator and said to him: "For God's sake don't run that elevator," and Johnson said: "All right." After Johnson had run the elevator up and it had stopped, Lowry got into the pit and started to do his work. He was standing about the east end of the battery box, facing north. However, he says he did not know whether he was standing between the two

guard-rails or not; that he did not look around him at the time; his work required very close attention. He had not been in the pit to exceed a minute when Johnson set the elevator in motion and plaintiff was struck by the counter-weight and received the injuries for which he sues.

There is evidence that appellee engaged in the work of repairing the battery upon the invitation of appellant. It

was for the mutual benefit of appellant and the

7. telephone company, and the former owed appellee protection. The invitation may be inferred from the facts proved. *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399; *Toledo, etc., R. Co. v. Hauck* (1893), 8 Ind. App. 367, and cases cited; *Harmer v. Reed Apartment, etc., Co.* (1902), 68 N. J. L. 332, 53 Atl. 402; *Siegel, Cooper & Co. v. Norton* (1904), 209 Ill. 201, 70 N. E. 636; *Atlanta, etc., Oil Mills v. Coffee* (1887), 80 Ga. 145, 4 S. E. 759, 12 Am. St. 244; *Kinchlow v. Midland Elevator Co.* (1896), 57 Kan. 374, 46 Pac. 703; *Wilson v. Olano* (1898), 51 N. Y. Supp. 109; *Coughtry v. Globe Woolen Co.* (1874), 56 N. Y. 124, 15 Am. Rep. 387; *Indermaur v. Dames* (1866), L. R. 1 C. P. 274; *Beach, Contrib. Neg.* (3d ed.), §§51, 67, 69. Appellee was not a mere licensee.

Appellant's servant in charge of the elevator did not step aside from his duties and his master's business in agreeing to hold the elevator, it being the duty of

8. the appellant to protect appellee. Appellant's servant could not, while discharging the duty of his master, be deemed a servant of appellee. *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 52 Am. Rep. 675; *Noblesville, etc., Gravel Road Co. v. Gause* (1881), 76 Ind. 142, 40 Am. Rep. 224; *Post v. Stockwell* (1887), 44 Hun 28.

Appellant cites a number of cases to the effect that the law places a duty upon every person in respect to his rela-

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tion with others, to exercise his faculties for his
 9. own safety, and that he cannot relieve himself of the duty by an agreement with another to perform it for him. As a general proposition this is correct, but whether a party has been guilty of contributory negligence must depend upon the particular facts of each case. The promises and agreements under which hazard is assumed, the conditions existing making effective or ineffective, and the use of the natural senses, are to be taken into account in determining the question of negligence. The numerous cases cited by appellant upon the foregoing proposition may, we think, be distinguished from the case at bar.

There is evidence within the issues to support the finding of facts, and to support the verdict. The plaintiff was at work in a proper place, not necessarily dangerous if
 10. the promise of the appellant made through his servants had been kept, and was injured by the negligence of appellant and without contributory negligence on his part, as found by the jury.

The judgment is fairly justified by the law and the evidence. Affirmed.

INDIANAPOLIS TRACTION & TERMINAL COMPANY v. GREY.

[No. 5,768. Filed May 29, 1906.]

1. **APPEAL AND ERROR.**—*Bills of Exceptions.*—*Duty of Judge to Correct Errors in.*—Under §641 Burns 1901, §629 R. S. 1881, providing that the judge shall correct and file bills of exceptions presented to him, his denial of the correctness of a statement in a bill is a sufficient correction thereof. p. 142.
2. **SAME.**—*Instructions.*—*Exceptions.*—Where no exceptions were taken to the giving of instructions, no questions can be raised thereon on appeal. p. 143.
3. **TRIAL.**—*Instructions.*—*Prejudicial.*—The giving of correct instructions cannot be considered as prejudicially affecting the jury. p. 143.

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From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Action by Maggie Grey against the Indianapolis Traction & Terminal Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

F. Winter, Miller & Barnett, W. H. Latta and John W. Kern, for appellant.

Wymond J. Beckett and William A. Johnson, for appellee.

COMSTOCK, P. J.—Action brought by appellee for personal injuries caused by a collision of two of appellant's cars while appellee was alighting from one of them. The cause was put at issue by general denial. A trial by jury resulted in a verdict on which judgment was rendered for \$4,000. Appellant's motion for a new trial was overruled. Appellant complains only of the giving of certain instructions.

The appellee contends that no question is presented as to the instructions because they are not in the record. Appellant attempted to put them in the record by bill of

1. exceptions. The court refused to sign the bill, for the reason that the record did not disclose that the defendant excepted to the giving of them. This proposition is not controverted by appellant, but it is contended that the judge should have corrected the bill in accordance with §641 Burns 1901, §629 R. S. 1881, and stated the manner in which the exceptions were taken or attempted to be taken. The cause was tried solely on the evidence introduced by appellee. Appellant took no exception to the instructions, but filed a motion for a new trial, setting out as errors the giving of the instructions. After the overruling of this motion, appellant attempted, by a bill of exceptions incorporating the instructions, to show that exceptions were taken. The court refused to sign this bill for the reason that no exceptions were taken. It does not appear that appellant attempted to show that exceptions had been taken,

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or attempted to be taken. In the brief of appellee it is stated that no exceptions were taken. The judge's denial of the correctness of the statement recited in the bill was a sufficient correction. No other effort appears to have been made to obtain the signature of the judge. Upon the

2. theory that it was a true bill, appellant is in no position to complain of the action of the trial court. Appellant claims that it is entitled to the instructions brought before the court on appeal, even though no exceptions were taken, and this for the reason that the verdict was, in this case, erroneously affected by the instruc-

3. tions. Unless the instructions are incorrect, they cannot be considered as prejudicially affecting the jury, and even then cannot be assailed unless exceptions were taken at the proper time.

Judgment affirmed.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY v. O'BRIEN.

[No. 5,778. Filed May 29, 1906.]

1. **TRIAL.—Railroads.—Setting Fires.—Burden of Proof.—Presumptions.**—In an action against a railroad company for negligently setting fires, the burden of proof is upon plaintiff; and negligence is not presumed from the fact alone that fire was communicated from its engine. p. 144.
2. **RAILROADS.—Permitting Combustibles on Right of Way.—Setting Fires.**—Railroad companies are liable for fires caused by reason of their suffering combustibles to remain on their right of way and thereby communicating fires to adjoining owners. p. 145.
3. **EVIDENCE.—Circumstantial.—Railroads.—Setting Fires.**—Negligence of a railroad company in setting fires may be established by circumstantial evidence. p. 146.
4. **NEW TRIAL.—Evidence.—Railroads.—Setting Fires.**—Where the evidence shows that defendant railroad company permitted dry grass to accumulate on its right of way; that twenty minutes after its train passed smoke was seen along the track; that grass was burnt on such way and the adjoining owners' woods were burning, a verdict for such owner is sustained by the evidence. p. 146.

From Martin Circuit Court; *James T. Rogers*, Special Judge.

Action by Mary Q. O'Brien against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. R. Gardiner, *C. K. Tharp* and *C. G. Gardiner*, for appellant.

Padgett & Padgett and *C. M. O'Brien*, for appellee.

COMSTOCK, J.—In November, 1903, the appellee owned about two hundred acres of land lying on the north side of and adjacent to the right of way of appellant. On the afternoon of November 9, 1903, fire was discovered in appellee's woods just north of the appellant's right of way, and it spread over about eighty acres of the woods. The wind was blowing from the southeast to the northwest.

The issues in the case are founded on a complaint in one paragraph in which the plaintiff alleges that she was the owner of the forest lands; that appellant carelessly and negligently suffered and permitted dry grass, weeds and other combustible materials to be and accumulate on its right of way adjacent to her lands, which grass, weeds and combustible materials were set on fire by one of defendant's passing locomotives, and that this fire was carelessly and negligently permitted by defendant to spread from the right of way to and upon her said lands, and it burned and destroyed her said forest to her damage in the sum of \$500. The defendant filed a general denial. The cause was submitted to a jury, and a verdict returned in favor of plaintiff for \$120, on which the court rendered judgment.

The action of the court in overruling its motion for a new trial is the error relied on for a reversal. The appeal is taken solely upon the evidence. The complaint

1. embodies three propositions: (1) The defendant carelessly and negligently suffered combustible material to accumulate on its right of way; (2) a passing locomotive of defendant set fire to this combustible material;

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(3) the defendant carelessly suffered and permitted this fire to escape from its right of way to the lands of plaintiff and burn her forest. The burden is on the plaintiff. No presumption of negligence on the part of the company arises from the fact of fire being communicated by an engine in use upon its railroad. Christopher O'Brien, in behalf of appellee, testified that there were dry weeds next to the track on the right of way, and dry crab-grass further out; that some had burned. Joseph Appogast, a witness for appellant, testified that the limbs of the trees hang low and reach half way between the north line of the right of way and the track, and some leaves had likely fallen on the right of way. Edward Nichols, in behalf of appellee, testified that there was dry crab-grass on the right of way, some of which had burned. He also testified that he saw smoke north of appellant's track about 2 o'clock, and that he saw a train pass on the defendant's track twenty minutes before he saw the fire; that it looked like the smoke of the fire came from the right of way. It was the custom for four passenger-trains to pass plaintiff's land between 12 and 2:30 o'clock. There was evidence that the fire had burned in two places in the right of way to within three or four feet of and out from the ties toward the edge of the right of way.

If a railroad company permits combustible material to accumulate and remain on its right of way to which fire is communicated by a passing locomotive, which

2. spreads to adjoining lands, the company will be liable. In behalf of appellant there was testimony that the fire did not start and did not burn upon the right of way except in one or two places where it spread into the right of way from the adjacent lands of appellee, and that the right of way had been burned over by appellant in the spring and again in August, 1903.

There is no positive testimony that the fire originated on appellant's right of way, but this fact and the negli-

gence of appellant may be established by circumstantial evidence. The evidence shows that there had been no fire on appellee's premises for an indefinite period before the date in question; that the wind was blowing from the railroad track toward appellee's premises, and that the fire was seen soon after the engine passed. These facts show that there was no probable cause for the fire except a passing locomotive, and justified the conclusion that the fire was occasioned as alleged in the complaint. *Toledo, etc., R. Co. v. Fenstermaker* (1904), 163 Ind. 534; *Pittsburgh, etc., R. Co. v. Indiana Horse-shoe Co.* (1900), 154 Ind. 322, and cases collected on page 333.

Under the decisions cited we cannot say that
4. the verdict of the jury is without evidence fairly tending to support it.
Judgment affirmed.

VANDALIA RAILROAD COMPANY v. KANARR.

[No. 5,790. Filed May 29, 1906.]

1. PLEADING.—*Complaint.—Exhibits.—Railroads.—Fences.—Repairs.*—The itemized statement of the cost of erecting a fence on a railroad right of way is not a necessary exhibit to a complaint by an abutting landowner against such company for the cost of constructing such fence, a direct allegation in the complaint of such items being sufficient. p. 147.
2. RAILROADS.—*Fences.—Repairs.—Notice.*—A notice by an abutting landowner to a railroad company that it has no fence on its right of way, and that unless it builds one within thirty days he will do so, is sufficient under §5324 Burns 1901, Acts 1885, p. 224, §2, though there was an old fence in such a state of repair that a new fence was necessary, a statement of the probable cost in such case being unnecessary. p. 148.
3. SAME.—*Fences.—Repairs.—Notice.*—A notice directed to the Terre Haute & Indianapolis Railroad Company to repair a fence along its right of way, delivered to the proper agent of the Terre Haute & Logansport Railway Company and by such agent

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sent to the home office of his company, and describing particularly the location of such fence, is sufficient as to such latter company. p. 151.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action by Charles C. Kanarr against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Samuel Parker and *John G. Williams*, for appellant.

J. D. McLaren and *H. A. Logan*, for appellee.

BLACK, J.—The appellee recovered judgment against the Terre Haute & Logansport Railway Company, from which, as its successor, the Vandalia Railroad Company appeals. The action was one to recover the value of a fence constructed along the west side of the right of way of the first-named company, where the railroad ran through the land of the appellee, which was fenced on its other sides, and was not within the limits of any city, incorporated town or village, pursuant to the provisions of §5323 *et seq.* Burns 1901, Acts 1885, p. 224.

It is contended on behalf of the appellant that the itemized statement or account, verified by affidavit, showing the expenses of the construction of the fence, or the

1. cost of repairs, including materials and labor, which under the provisions of the statute is to be presented for payment or furnished to the agent of the railroad company when the fence has been completed, or the repairs have been made, constitutes the foundation of such an action in such a sense that a copy thereof should be filed with the complaint as an exhibit, or should be inserted in the body of the pleading; and counsel cites *Chicago, etc., R. Co. v. Ross* (1893), 8 Ind. App. 188, which, however, furnishes no support for such a proposition. It was there held that a copy of the thirty days' notice to be given by the landowner in writing of his intention to enter upon the right of way to build the fence, which must be given to

the agent of the railroad company, need not be set out as constituting the basis of the action. It appears from the opinion of the court that a bill of particulars of the cost of the fence was filed with the complaint, which was held sufficient on demurrer. In the paragraph of complaint before us, to which this objection of the appellant is addressed, the items of expense are shown by direct averment. This is sufficient in such matter, the giving of the notices required by statute being shown by averments of the facts. See *Chicago, etc., R. Co. v. Vert* (1900), 24 Ind. App. 78.

The court rendered a special finding of facts.

It is contended that the thirty days' notice of intention to enter to construct the fence was insufficient because it was addressed to "the Terre Haute & Indianapolis 2. Railroad Company," and because it failed to state the probable cost of repairing the fence. It was found by the court that the railroad was built in the locality in question in the years 1883 and 1884, and that within six months after it was built the owner of the railroad at that time caused a right of way fence to be built on the west side of the right of way at the place in question; but that prior to July 5, 1903, that fence had decayed and rotted, and had become so out of repair that no part of it would turn cattle, horses, mules, sheep, hogs or other stock. There was no fence on the right of way where it abutted upon the appellee's lands that would turn cattle, horses, mules, sheep, hogs or other stock at the time of the service of the notice by the appellee, or at the time of the building of the fence by him. He was, and since February 21, 1903, had been, continuously, the owner in fee simple and in possession of the land in question, abutting on the west line of the right of way of the Terre Haute & Logansport Railway Company, which since December 1, 1898, had owned and operated the railroad. July 5, 1904, the appellee served on John M. Montgomery a notice as follows:

"State of Indiana, Marshall County, ss. Notice to the Terre Haute & Indianapolis Railroad Company, operating and controlling the Terre Haute & Logansport Railway: You are hereby notified that I, the undersigned, am the owner and in actual possession of the following described farm and pasture lands, situated in North township, Marshall county, State of Indiana; * * * that all said lands abut on the west line of the right of way of the Terre Haute & Logansport Railroad, which was constructed through said lands and through said county, from Logansport, Indiana, to South Bend, Indiana, about twenty years ago, and which has been operated and controlled by you ever since its completion. There is no fence on your right of way through said lands, and my cattle and other stock are continually getting on your right of way through said lands, and on your roadbed from off said lands, for the reason that you have no fence on your right of way to keep them off. Now, you are hereby notified that I intend to enter upon your land, right of way and railroad track and build a good and sufficient fence on your right of way through my lands at your cost and expense, unless you shall cause such fence to be built within thirty days after the service of this notice on your nearest shipping agent to my lands.

Dated July 2, 1904.

Charles C. Kanarr."

It was found that said Montgomery, July 5, 1904, was, and for the past three years had been, continuously, employed by the defendant Terre Haute & Logansport Railway Company, as its agent for receiving and shipping freight at its station at Lapaz Junction, Indiana, which was the nearest freight receiving and shipping station of that railroad to the appellee's said lands. This notice was served on Montgomery at his office in said station by reading it to him, and by leaving a duplicate thereof with him. When this notice was received by him, he immediately sent it to the superintendent of the defendant Terre Haute & Logansport Railway Company, at Logansport, Indiana, and he did not send it to the Terre Haute & Indianapolis

Railroad Company. During all the time said defendant was the owner of the railroad in question, and in possession thereof and operating it, there was a railroad corporation in this State known as the Terre Haute & Indianapolis Railroad Company, owner of a line of railroad from Indianapolis to Terre Haute, Indiana, but the last-named company was not in possession of said railroad and right of way of the defendant Terre Haute & Logansport Railway Company, or operating or controlling the same, after November 30, 1898. Other portions of the finding need not be set forth.

Section 5324 Burns 1901, Acts 1885, p. 224, §2, relates to the method of proceeding if the railroad corporation, etc., neglects or refuses to construct the fence, etc.; while §5325 Burns 1901, Acts 1885, p. 224, §3, relates to the keeping in good repair of the fence, etc., which has been completed. In the portion of the latter section providing for the giving of notice by the landowner to the agent receiving and shipping freight at the station nearest the land in question, it is provided that the landowner may notify such agent in writing "that a portion of the fence is out of repair, stating where the same is out of repair, and the probable cost of making such repair." In the former section relating to the construction of a fence, etc., it is not provided that the notice to the agent shall state the probable cost. The notice given by the appellee fulfilled the requirement in this regard of §5324, *supra*. It is manifest that the notice contemplated the building of a new fence, and not the repairing of an old one; and we are of the opinion that the facts of the case as found by the court authorized the appellee to proceed in such manner, a new fence being required under the circumstances, and not the repairing of certain portions of an existing fence sufficient except as to such portions.

Much stress has been placed here upon the manner in which the thirty days' notice was addressed—to the Terre

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Haute & Indianapolis Railroad Company, etc.

3. The notice clearly designated the locality where the fence was needed—between the right of way of the defendant Terre Haute & Logansport Railway Company and certain described land owned and occupied by the appellee in a designated township, etc. It was served upon the proper agent of the last-named company, and by him was sent at once to his own company. The mistake in the address at the beginning of the notice was one which could not mislead the company which so received the notice. It gave the defendant company all the necessary information contemplated by the statute. It could not ignore the notice and thereby escape liability for the reasonable value of a proper fence constructed by the appellee at a place where the railroad corporation was bound by statute to construct and maintain such a fence. The statute is remedial, and must be liberally applied to the facts.

Judgment affirmed.

LEWIS TOWNSHIP IMPROVEMENT COMPANY
v. ROYER.

[No. 5,645. Filed March 8, 1906. Rehearing denied May 29, 1906.]

1. PLEADING.—*Complaint.—Levees and Dikes.—Statutes.*—Under §7222 Burns 1901, Acts 1889, p. 104, §21, a formal complaint by the complaining party in an assessment of damages and benefits on account of the construction of levees and dikes is unnecessary. p. 154.
2. APPEAL AND ERROR.—*Complaint.—Initial Attack on Appeal.*—A complaint attacked for the first time on appeal will be held sufficient if it contains facts sufficient to bar another action for the same cause. p. 154.
3. PLEADING.—*Complaint.—Recital of Evidence.—Motion to Make More Specific.*—A complaint should not plead the evidence; and if a complaint is obscure a motion to make more specific is the remedy. p. 154.

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4. **LEVEES.—Assessment of Damages.—Prospective.**—In the assessment of damages on account of the construction of a levee, all damages, present and prospective, should be included. p. 154.
5. **WATERS AND WATERCOURSES.—Obstructions.—Liability.**—Any person obstructing a watercourse to the damage of another, whether negligent or not, is liable therefor. p. 155.
6. **CONSTITUTIONAL LAW.—Eminent Domain.—Damages.—Delegation of Power.**—The legislature cannot delegate the power of eminent domain so as to take private property without compensation. p. 155.
7. **PLEADING.—Complaint.—Levees.—Assessment of Damages.**—On appeal to the circuit court from an assessment of damages for the construction of a levee, a complaint showing that the appellant is the owner of certain real property in fee simple; that the appraisers erred in the assessment of damages as to such property; that his damages are \$1,200 instead of \$90 as assessed; that he is the owner of another tract and is damaged therein \$1,200, and that said assessment gave him nothing, and praying that an issue be made and the cause tried, is sufficient to state a cause of action when attacked for the first time on appeal to the Appellate Court. p. 155.
8. **APPEAL AND ERROR.—Bills of Exceptions.—Whether in Record.**—Where ninety days were given on April 11, in which to file bills of exceptions, and a bill was filed July 11, it was too late and consequently is not in the record, the rule being to exclude the day on which time was granted and to include the last day. p. 155.

From Clay Circuit Court; *Presley O. Colliver*, Judge.

Proceedings for the establishment and construction of a levee. From the assessment of damages against Samuel Royer the Lewis Township Improvement Company appeals. *Affirmed.*

McNutt & Shattuck and *Rawley & Hutchison*, for appellant.

A. W. Knight and *S. M. McGregor*, for appellee.

COMSTOCK, J.—Appellee appealed to the Clay Circuit Court from the assessment of damages and benefits to certain lands owned by him, as provided by §7222 Burns 1901, Acts 1889, p. 104, §21.

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On June 4, 1902, under the provisions of §7222, *supra*, he filed his statement in writing in the office of the clerk of the Clay Circuit Court, substantially as follows: The undersigned, Samuel Royer, hereby appeals to the Clay Circuit Court from the assessment of damages and benefits made by William Arney, Walter B. Ringo and Nathan D. Stwalley, appointed by the Board of Commissioners of the County of Clay to assess the benefits and damages in the matter of the proceedings of the Lewis Township Improvement Company to construct a levee along the west bank of Eel river in Clay county, Indiana, and which said assessment was dated May 10, 1902, in which said appraisers assessed the damages of the undersigned at \$90, and the benefits at \$40, and which said assessment was filed for record in the recorder's office of Clay county, Indiana, on May 16, 1902, and was recorded in miscellaneous record No. 12, at pages from 381 to 385. The undersigned is now, was at the time of said assessment, and for a long time prior thereto had been, the owner in fee in his own right of said real estate. Said appraisers erred in the assessment of the damages which will be sustained by the undersigned by reason of the construction of said levee, in this, to wit: Said land is now of the reasonable value of \$30 per acre, but the construction of said levee will cause Eel river to overflow the same to such an extent that it will be and become wholly worthless, whereby the undersigned will be damaged in the sum of \$1,200, instead of \$90, as assessed by said appraisers. The undersigned further shows that he is also the owner in fee simple in his own right, and was such owner at the time of the assessment, of another tract of land, which is now and was at the time of said assessment of the reasonable value of \$1,200, but that if said levee is constructed it will cause the waters of Eel river to overflow the same to such an extent that the same will become wholly worthless, whereby he will be damaged in the sum of \$1,200, whereas said appraisers did not

assess to him any damages as to said last-described real estate. Wherefore he prays that a transcript of said proceedings be made out and certified to the Clay Circuit Court, to which he appeals from said assessment, that an issue may be made, etc. The cause was put at issue by general denial, submitted to a jury, a verdict returned fixing the damages at \$495 and benefits at \$40, and judgment rendered for the amount of benefits and damages so fixed.

The first specification of error challenges the sufficiency of the complaint for want of facts. It is questioned for the first time in this court. The objection urged

1. against it is that it does not show that any of the legal rights of the appellee were affected by the construction of the levee and that the damages sought to be recorded are remote and consequential. A formal complaint is not required under the statute. §7222, *supra*.

Where the sufficiency of a complaint is tested for the first time by an assignment of error in this court, it will be held sufficient if it contains facts enough to bar

2. another action for the same cause. *Citizens St. R. Co. v. Willooby* (1893), 134 Ind. 563; *Loeb v. Tinkler* (1890), 124 Ind. 331, and cases cited.

It is also urged against the complaint that it contains nothing to show how the construction of the levee would cause the water to overflow the levee. That would

3. be to plead evidence. A motion to make more specific would meet that objection. It is also claimed that the complaint does not allege that the appellant in its proceedings to construct said levee was negligent. This is not a suit for the negligent construction of a levee,
4. but an appeal from an assessment of damages under the statute; and in this appeal all damages, present and prospective, must be assessed, because it will be presumed that all matters affecting the land were considered when the original assessment was made. *Rehman v. New*

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Albany, etc., R. Co. (1893), 8 Ind. App. 200. There are many authorities to the effect that when the original assessment has been made for the taking of land and compensation paid therefor, a corporation occupying the land under legislative authority granted for the purpose of constructing a work of public utility may interfere with a running stream to the damage of another, without being liable, unless it is guilty of some negligence in constructing the improvement. Some of these authorities are cited by appellant, but they are not applicable to the case at bar. Neither an individual

nor a private corporation, without legislative authority, can interfere with a running stream to the damage of others, whether negligent or not, without being liable. The legislature could have no power to grant a corporation, in the original taking of property, the privilege of taking land under the right of eminent

domain, without just compensation. *Bellinger v. New York Cent. Railroad* (1861), 23 N. Y. 42; *New York, etc., R. Co. v. Hamlet Hay Co.* (1898), 149 Ind. 344.

The complaint before us is clearly sufficient to bar another action for the same cause and the specification of error cannot be sustained. The only other alleged error

discussed is the refusal of the court to give to the jury certain instructions requested by appellant. Appellee, while insisting that these instructions do not correctly state the law, contends that they cannot be considered because the evidence is not in the record.

Adams v. Vanderbeck (1897), 148 Ind. 92. The record shows that on April 11, 1904, the court gave appellant ninety days within which to file bills of exceptions. It further shows that on July 11, 1904, the appellant presented a bill of exceptions containing the evidence to the court for signature and filed the same with the clerk on that day. Adopting the usual mode of computation, excluding the first and including the last day, we have in

April nineteen days, in May thirty-one days, in June thirty and in July eleven days, making a total of ninety-one days, showing that the bill was presented, signed and filed on the day following the time limited by the court. It was therefore not in the record. *Watt v. Board, etc.* (1892), 133 Ind. 132; *McFadden v. Owens* (1898), 150 Ind. 213. We have, however, considered the instructions and conclude that there was no error in their refusal.

Judgment affirmed.

HUBBARD v. SECURITY TRUST COMPANY, RECEIVER.

[No. 5,718. Filed May 29, 1906.]

1. **RECEIVERS.**—*Relation to Creditors.*—*Executions.*—The appointment of a receiver does not affect the relation of creditors to the assets in his hands, but merely suspends the ordinary remedies for the enforcement of debts. p. 158.
2. **SUBROGATION.**—*On What Depends.*—The doctrine of subrogation is independent of contract relations, and applies in all cases where another in good conscience ought to pay. p. 158.
3. **EXECUTIONS.**—*Delivery Bonds.*—*Principal and Surety.*—The principal upon a delivery bond given to recover possession of property taken upon execution is primarily liable, and his duty is to hold his surety thereon harmless. p. 158.
4. **SUBROGATION.**—*Surety on Delivery Bond.*—*Receivers.*—The surety on a delivery bond is subrogated to the rights of the judgment creditor, as against the receiver for the judgment debtor, where such surety has been compelled to pay such bond; and it is not necessary that the question of suretyship be adjudicated in the statutory manner, in order for him to claim such right of subrogation. p. 158.
5. **EXECUTIONS.**—*Personal Property.*—*Liens.*—An execution is a lien upon the judgment debtor's personal property from the time it comes into the proper officer's hands. p. 159.
6. **SAME.**—*Lien.*—*Suspension.*—The taking of the judgment debtor's delivery bond entitles such debtor to the custody of the goods named therein for the time, but does not discharge the lien of such execution. p. 159.

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7. SUBROGATION.—*Surety.—Executions.—Receivers.—Appeal and Error.*—The surety on a delivery bond, who is compelled to pay such bond, is entitled to priority in his claim filed with the receiver of the execution debtor, and if such priority be denied by the trial court, he may appeal. p. 160.

From Marion Circuit Court (13,385); *Henry Clay Allen*, Judge.

Suit by Walter J. Hubbard against The Security Trust Company as receiver of the Topp Hygienic Milk Company. From a decree denying all the relief prayed, plaintiff appeals. *Reversed.*

C. B. Clarke, W. C. Clarke and M. M. Batchelder, for appellant.

Frank C. Groninger, for appellee.

ROBY, J.—The question for decision grows out of the following facts: The Varney Electric Company in 1904 obtained a judgment in a justice of the peace court of Marion county against the Topp Hygienic Milk Company for \$117.29. An execution was issued thereon in due form, and placed in the hands of a constable, who levied upon a team of horses, harness and wagon belonging to said milk company, which thereupon gave a delivery bond therefor, the same being executed by appellant as its surety, and by virtue of which said company retained possession of said property. It failed to pay the value of or deliver said property as required by the terms of said bond, and the electric company, by reason of said default, recovered judgment upon said bond against appellant for the sum of \$144.37, and caused an execution against him to issue thereon, by reason of which he was compelled to and did pay the amount of said judgment and costs. In the meantime, a receiver for the milk company had been appointed, who took possession of the horses, harness and wagon above specified and sold the same for \$180. Nothing has been paid by the milk company or receiver upon said judgment, nor to appellant, who intervened in the matter

of said receivership and petitions the court for an order requiring the receiver to pay him the amount paid by him as aforesaid. The court found upon these facts that appellant's claim was no lien upon the assets in the hands of the receiver, and allowed it as a general claim. Appellant's position is that he is entitled to have said amount allowed as a preferred claim.

The receiver occupies no different position with regard to the property released by said delivery bond or its proceeds than would the milk company had no receiver

1. for it been appointed. The effect of a receivership is to suspend the ordinary remedies for the enforcement of liability and render necessary a resort to the court having jurisdiction therein. *McAnally v. Glidden* (1902), 30 Ind. App. 22.

The doctrine of subrogation is independent of any merely contractual relations between the parties to be affected thereby, and applies to every instance where

2. one person is required to pay a debt for which another is primarily answerable and should, in good conscience, pay. *Johnson v. Barrett* (1889), 117 Ind. 551, 552; *Peirce v. Higgins* (1885), 101 Ind. 178; *Warford v. Hankins* (1898), 150 Ind. 489.

Appellant was not liable for the payment of the Varney judgment. He was not primarily liable for the payment of the judgment rendered upon the bond against

3. him, the duty of the milk company being to return the property or make payment as it had agreed to do, and thereby hold its surety harmless.

The case is one which demands the application of the equitable doctrine of subrogation, and appellant is entitled, as against the receivership, to the same remedies

4. that the original creditor might have. It is urged by appellee that the question of appellant's suretyship has not been adjudicated. The answer to this objec-

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tion is that the right which it is sought to enforce is an equitable one and equally available whether the question of suretyship has or has not been adjudicated in the statutory manner. *Thomas v. Stewart* (1889), 117 Ind. 50, 53.

It remains, therefore, only to inquire what right the judgment creditor held. An execution operates as a lien

on the personal property of the judgment debtor,

5. liable to be seized on it from the time it comes to the hands of the officer. §1576 Burns 1901, §1508

R. S. 1881.

Such property taken in execution may be returned to the execution defendant upon the delivery of a written undertaking, with sufficient surety to the effect that the

6. property shall be delivered to the officer at a time and place named in the undertaking, to be sold according to law, or for the payment to the officer of the value thereof. §§756, 1582 Burns 1901, §§744, 1514 R. S. 1881. Upon the condition of such bond being broken, the execution plaintiff may prosecute his remedy thereon, or by alias execution cause the same or other property to be levied on, or having failed in either remedy may resort to the other. §1583 Burns 1901, §1515 R. S. 1881. The issuance of an alias writ upon the return of an execution by the officer that he has a delivery bond, is made obligatory, and under it the property first levied upon may be sold in the same manner as on the first execution. §1578 Burns 1901, §1510 R. S. 1881. The effect of the delivery bond is to entitle the defendant to the custody of the goods. It does not operate to discharge any lien or right of the judgment creditor. *Bick v. Lang* (1896), 15 Ind. App. 503; *Gass v. Williams* (1874), 46 Ind. 253; *Dunn v. Crocker* (1864), 22 Ind. 324; *Jaeger v. Stoelting* (1868), 30 Ind. 341.

Appellant submitted his right to the trial court for adjudication. He had a right to appeal from any order

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adverse to his interest. He was entitled, not only
 7. to have his claim allowed, but that it be given
 priority. *Savannah v. Jesup* (1882), 106 U. S.
 563, 27 L. Ed. 276; *Bloxham v. Consumers, etc., St. R.*
Co. (1895), 36 Fla. 519, 29 L. R. A. 507; *Farmers Loan,*
etc., Co. v. Canada, etc., R. Co. (1891), 127 Ind. 250, 260.

Judgment reversed, and cause remanded, with instruc-
 tions to sustain motion for a new trial and further pro-
 ceedings.

INDIANAPOLIS TRACTION & TERMINAL COMPANY v. SMITH.

[No. 5,736. Filed May 29, 1906.]

1. **APPEAL AND ERROR.—Complaint.—Initial Attack on Appeal.**—A complaint will be considered sufficient when attacked for the first time on appeal, where it does not wholly fail to allege the material facts necessary to constitute a cause of action, mere uncertainty or inadequacy of averment being insufficient to render it bad. p. 164.
2. **SAME.—Complaint.—Initial Attack on Appeal.**—A complaint attacked for the first time on appeal will be held good if it states facts sufficient to bar another action. p. 165.
3. **STREET RAILROADS.—Person in Peril.—Duty of Company.**—It is the duty of a street railroad company when it sees a person in peril from the operation of its cars to act so as not to increase such danger. p. 165.
4. **PLEADING.—Complaint.—Street Railroads.—Failure to Look.**—A complaint alleging that the motorman of defendant street railroad company negligently failed to look ahead; that by the exercise of reasonable care he could have seen plaintiff in his dangerous position on the track from which he could not extricate himself, and that by reason of such negligence plaintiff was injured, is sufficient, when attacked for the first time on appeal. p. 165.
5. **APPEAL AND ERROR.—Weighing Evidence.—Street Railroads.—Negligence.—Contributory.—Question for Jury.**—Where the evidence was conflicting whether the defendant street railroad company was negligent in failing to see and avoid injury to plaintiff while driving a heavily loaded wagon on its

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track on a narrow street, and whether plaintiff was guilty of contributory negligence in going on such street, the verdict is conclusive on appeal. p. 166.

6. **TRIAL.—Instructions.—Street Railroads.—Failure to Look.**—An instruction that defendant street railroad company must use reasonable care to discover persons on its track, and its failure to do so, or failure to stop its car, when possible, after such discovery, resulting in injury, renders it liable for such injuries, is correct. p. 170.
7. **SAME.—Instructions.—Negligence.—Failure to Negative Contributory Negligence.**—An instruction that plaintiff should recover if defendant's negligence is established is not bad where, in other instructions, the jury were told that if plaintiff was guilty of contributory negligence he could not recover. p. 170.
8. **SAME.—Instructions.—Undisputed Facts.**—The court may assume in his instructions the truth of undisputed facts without invading the province of the jury. p. 171.
9. **SAME.—Instructions.—Street Railroads.—Person in Peril.—Care Required.**—An instruction that the defendant street railroad company, after discovering a person in peril by the operation of its car, must exercise the highest degree of care to avoid his injury, is not erroneous. p. 171.
10. **SAME.—Instructions.—Street Railroads.—Failure to Look.**—An instruction that if the conditions were such that the motorman of defendant street railroad company's car could have seen plaintiff in peril by the exercise of ordinary diligence, and could have stopped his car in time to avoid the injury, and he failed to do so, defendant is liable therefor, provided plaintiff was not guilty of contributory negligence, is correct. p. 172.
11. **DAMAGES.—Excessive.**—Where there is nothing to indicate that the jury was improperly influenced by prejudice or partiality, the damages assessed will not be considered excessive. p. 172.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Action by James Smith against the Indianapolis Traction & Terminal Company. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Affirmed*.

F. Winter, W. H. Latta, Oscar Matthews and Payne & Oberreich, for appellant.

George Young and George W. Grubbs, for appellee.

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WILEY, J.—Appellee recovered a judgment against appellant in the court below, for a personal injury growing out of a collision of one of appellant's cars with the wagon in which he was riding.

Appellant relies for a reversal, as disclosed by its assignment of errors, upon the insufficiency of the complaint, and the overruling of its motion for a new trial. The complaint is in two paragraphs, and its sufficiency is questioned for the first time in this court.

Counsel for appellant have not made any objection to the sufficiency of the first paragraph of the complaint, but direct their argument against the second paragraph. Omitting the formal parts of the second paragraph it is alleged that appellant owned and operated a line of street railway along and over Indiana avenue; that said avenue at the point where appellee was injured was very narrow; that appellant had laid double tracks upon and over said street; that the avenue extends in a northwesterly and southeasterly direction; that on the southwest side thereof there is a ditch running along the side of the street; that it is about one and one-half feet deep and five feet wide; that on January 15, 1904, said ditch was filled with ice, snow, sleet and water, and was in a dangerous and unsafe condition, so that it was impossible for appellee to drive in or near to it; that there was not room enough for him to drive with the wagon between such ditch and appellant's track, without getting so near to the track as to obstruct the passage of a street car thereon; that at about 9 o'clock p. m. of said day appellee was driving in a southeasterly direction on Indiana avenue, and on the right-hand side of the street, and between appellant's track and said ditch; that he was driving a heavily-loaded wagon; that he was driving as near to the ditch as it was safe to drive, and the only place he could drive as he was going in said direction; that the space between appellant's track and the ditch was not sufficient for him to drive and permit the cars to pass; that

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before he drove near or onto the track he stopped and looked for cars coming from the northwest on said track, but that he could not see any cars in sight; that he then drove in the aforesaid narrow place; that one of appellant's cars approached from the northwest, traveling at a high and dangerous rate of speed, to wit, thirty miles per hour, and was running in the same direction that appellee was driving; that said car was in charge of a motorman and conductor who were agents of appellant; that by the exercise of reasonable care the motorman could have seen appellee on appellant's track; that if said motorman had kept a lookout at said time and place he could have seen appellee in time to stop the car before running into his wagon; that there was nothing to obstruct the view of appellant's servants at said place, or to prevent their seeing appellee driving on the track, in time for the motorman to stop the car before injuring him. It is then alleged that the servants in charge of the car did not give any warning of its approach, did not sound the gong or ring the bell; that appellant did not stop said car nor check its speed to give appellee an opportunity to get off the track; that he could not have gotten off the track in time to avoid the injury, while the car was running at such a high and dangerous rate of speed; that appellant was grossly careless and negligent in running the car at such rate of speed, and in not sounding the gong or ringing the bell, as a warning to appellee, and in not stopping the car before running into him. It is further alleged that appellant, by the exercise of reasonable care, could have stopped the car before colliding with appellee, and that appellant's servants knew, or ought to have known, that appellee could not get out of the way of said car at the rate of speed it was running; that appellant's car in charge of the motorman and conductor, as aforesaid, "carelessly and negligently ran into plaintiff's wagon, * * * destroying the same, throw-

ing it into the ditch, and by reason of said collision threw this plaintiff violently to the ground," etc., whereby he was injured.

While this paragraph is not a model pleading, as against an attack for the first time in this court, it will be upheld

for two reasons: (1) In order that a complaint

1. may be successfully attacked by an assignment of errors on appeal, there must be total failure to allege some fact essential to the existence of a cause of action. Uncertainty or inadequacy of averment will not render a complaint bad when attacked for the first time on appeal. In the case of the *City of South Bend v. Turner* (1901), 156 Ind. 418, 83 Am. St. 200, it was said: "The total absence from the complaint of any averment of some fact or facts essential to the existence of the cause of action, or the presence of some averment that absolutely destroys the plaintiff's right of recovery, may be for the first time raised in this court by an independent assignment of errors under §89 of the code (§346 Burns 1894, §343 R. S. 1881 and Horner 1897), but mere uncertainty, or inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection, and who brings his complaint for the first time, after the cause of action has been strengthened by the verdict of a jury, and the presumptions indulged in favor of the decisions of the trial court upon motions for judgment, and for a new trial." See, also, *Peoria, etc., R. Co. v. Attica, etc., R. Co.* (1900), 154 Ind. 218; *Town of Knightstown v. Homer* (1905), 36 Ind. App. 139; *Efroymsen v. Smith* (1902), 29 Ind. App. 451; *Cleveland, etc., R. Co. v. Baker* (1900), 24 Ind. App. 152; *Brandis v. Grissom* (1901), 26 Ind. App. 661.

(2) When the sufficiency of a complaint is tested for the first time on appeal, by an assignment of errors, it will

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be held sufficient if it contains facts enough to bar

2. another action. *Harris v. State, ex rel.* (1890), 123 Ind. 272; *Peters v. Banta* (1889), 120 Ind. 416; *Town of Knightstown v. Homer, supra*, and cases cited.

It is the duty of the employes of a street railway company, in the operation of cars, when they see a person in peril, from which he cannot extricate himself, to act

3. so as not to increase such danger, and when they fail to exercise that degree of care required of them, and such failure results in injury, the company becomes liable for resulting damages. *Lake Erie, etc., B. Co. v. Juday* (1898), 19 Ind. App. 436. In the case just cited this court said: "It is sound doctrine, strongly entrenched by the authorities, that when one person sees another in danger or peril, from which he is unable to extricate himself with reasonable care and prudence, it is the highest duty of such person so to act as not to increase the peril, and, if he does act in a manner to increase the danger, with the full knowledge of the facts, it is negligence, for which he may be required to respond in damages." A number of authorities in support of this rule are there cited, to which we refer without comment.

In this second paragraph of complaint it is directly averred that appellant's servants in charge of and operating the car could, by the exercise of reasonable care,

4. have discovered appellee's peril in time to avoid injuring him. It is clear to us that there is not a total failure to allege some fact or facts essential to the existence of appellee's cause of action, and that the facts alleged are amply sufficient to bar another action. Applying these rules, and upon the authorities cited, the paragraph is sufficient as against an attack for the first time in this court.

In its motion for a new trial appellant has assigned twenty-nine reasons in support of it. We will consider

only such as have been discussed, and in their order

5. of discussion. One of the reasons assigned for a new trial is that the verdict is not sustained by sufficient evidence, and upon this point it is contended by counsel that there is no evidence to support the verdict. Under the rule, so firmly established, that this court cannot weight conflicting evidence, it becomes our duty to hold that if there is any evidence in the record supportive of the verdict, we are not authorized to reverse a judgment upon the evidence. There is some conflict in the evidence as to some vital points in the case, and this being true we can neither weigh nor reconcile such conflict. It is contended on the part of counsel for appellant that the evidence acquits appellant of any negligence, and shows that appellee was guilty of contributory negligence. As relates to these two questions, the evidence, in brief, is as follows: Appellee was driving a heavily loaded wagon on Indiana avenue, going in a southeasterly direction. The accident occurred between Milburn and Hiawatha streets, and about seventy-five yards from the latter street. There was an electric light at the intersection of Hiawatha street and Indiana avenue, which threw its light beyond Milburn street to Montcalm street. The night was not real dark, but partly cloudy. The evidence tends to show that the ground at Hiawatha street is about fifty inches higher than it is at Milburn street. Appellee was driving in a direct line of vision between the motorman and the electric light, from the time the car came near Milburn street. The electric light at Hiawatha street hung on an arm extending from a pole, and threw light upon the tracks. As to whether the motorman in charge of the car gave any alarm by sounding the gong or ringing the bell is conflicting. There was a ditch at the outer edge of the street, and the space between the ditch and the track was about six feet and six inches. Appellee testified that, to avoid driving into the ditch, he pulled onto the track "one wheel just

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inside the track, to hold myself from sliding off into the ditch, and started ahead." He further testified that he both looked and listened for cars going in both directions before he drove onto the track, and saw a car approaching him on the opposite track, but did not see one behind him going in the same direction that he was.

One of appellant's witnesses testified that at the point of collision a person would have to drive very carefully to allow a car to pass, and pretty well out into the gutter. The motorman testified that he did not see the wagon in which appellee was riding until he was within about twelve feet of it. The grade of Indiana avenue from Milburn to Hiawatha streets is an incline. The speed of the car was variously estimated by the witnesses at from eleven to twenty miles per hour, one witness placing it at twenty-five miles an hour. There was evidence also tending to show that the car ran from seventy-five to one hundred feet after it struck the wagon. The wagon appellee was driving was six feet wide. There were no obstructions on Indiana avenue, between the point where the car turned from Montcalm street onto the avenue and the point of collision that would obstruct the motorman's view of the wagon in front of him. There is some evidence to the effect that appellee could not have crossed over the tracks and driven on the opposite side of the street. Under this evidence the question of appellant's negligence and appellee's contributory negligence was one for the jury, under proper instructions, and the jury having resolved the question of appellant's negligence against it, and appellee's freedom from fault in his favor, it is beyond our power to review that finding upon the evidence.

The twelfth, thirteenth and fourteenth instructions, given by the court and excepted to by appellant, are as follows: "(12) It is the duty of a motorman in charge of a street car to exercise reasonable care and diligence to discover any person or vehicle upon or near to the track

in front of the car which he is operating, and if he discovers a vehicle in charge of a person upon said track, or so near as likely to be struck by said car, and he has reason to believe that said person is unconscious of his danger, or unable to avoid it, it is his duty to use every reasonable effort to stop the car, and if in such case he causes or permits said car to run with unabated speed, and without effort to check or stop the same, until it runs into and strikes said vehicle, destroying it, injuring the horses attached to it, and the person in charge of it, the company would be guilty of negligence, and a recovery could be had for any injury sustained.

“(18) It is the duty of a motorman, running and operating a street car along and upon the streets of a city, to have it under such control that it may be stopped within a short distance, if occasion requires. From his failure to exercise reasonable care in that regard, negligence may be inferred. It is also the duty of a motorman to exercise the highest degree of care to avoid injury to a person after discovering his peril. If you find from a preponderance of the evidence that on January 12, 1904, the defendant company was running and operating a line of railway along and upon Indiana avenue, in the city of Indianapolis, having double tracks thereon; that at a point near where said line of railway intersects Hiawatha street said Indiana avenue is narrow, said street being sixty feet wide, and no more; that at said time and at said place on said street, and on the southwest side of said street, there was a ditch one and one-half feet deep and five feet wide, which was filled with water, snow and ice, and was in a dangerous and unsafe condition to drive upon or over with a vehicle, and there was not sufficient space between said ditch and the tracks of defendant's railway for a person to drive with a vehicle, without obstructing said street cars; that said company and its employes had full knowledge of the condition of said street and of the dangerous condition of said

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ditch for the passage of vehicles; that on January 19, 1904, plaintiff, in the transaction of his business, was driving a horse and loaded wagon along Indiana avenue; that before he reached or entered upon said narrow place he stopped and looked to see if any car was in sight or approaching; that there was none; that thereupon he drove carefully along the narrow space, the wheel of his wagon being upon said track or very near to it; that as he was so driving he saw one of the defendant's cars approaching from the northwest, running at a high and dangerous speed; that he was in plain view of said car and there was nothing to prevent the conductor and motorman in charge of said car from seeing him or his wagon in the perilous situation in which he was; that no warning was given; that the speed of said car was not lessened, nor was said car stopped nor attempted to be stopped; that plaintiff endeavored to drive out of the way and avoid said car, but could not do so; that said car was negligently run against his said wagon, overturning it and throwing it in the ditch; that plaintiff was thrown to the ground, his leg was broken and he was otherwise injured, his wagon broken and his horse injured, as in complaint set out—then I instruct you that you should find for the plaintiff, unless you should further find that plaintiff, by his own negligence, contributed to the injury.

“(14) If you find from the evidence that upon the day and at the time of the accident it was clear, and the view at the point where it occurred was unobstructed, so that the motorman could have seen plaintiff's wagon on or near the track, if he had exercised ordinary diligence, and further find that the motorman had knowledge of the conditions existing at the place of the collision, and that he could have seen the plaintiff's peril in time to stop the car and prevent the accident, by the exercise of reasonable care, then I instruct that his failure to do so, thus causing the injury, would constitute negligence upon the part of the company defendant, and you should find for the plaintiff, unless you

further find that plaintiff, by his own negligence, caused or contributed to the injury complained of."

The objections which counsel urge to the twelfth instruction are: (a) That it assumes that the car could have been stopped if the motorman had used the means at his

6. hand; (b) that the car might have been so close upon the wagon that all attempts to stop it would have been futile; (c) that the question of negligence should not be made to rest upon the fact as to whether an attempt was made to stop the car, if it was a physical impossibility to stop it after discovering the danger; (d) that the question of contributory negligence on the part of appellee is disregarded and liability is made to depend upon the acts of the appellant. The instruction as an entirety correctly states the law. We are unable to see anything in the instruction that assumes that the car could have been stopped. It is the theory and contention of appellee that the motorman could, by the exercise of reasonable care, have seen the wagon by reason of the light from the electric light and the headlight of the car. There is no doubt but that it is the duty of a motorman in charge of a street car to exercise reasonable care to discover a person or a vehicle upon or near to the track, in front of the car, and that is what, in the first part of the instruction, the court told the jury.

Omitting from the instruction the question of appellee's contributory negligence does not render the instruction erroneous when construed in connection with the

7. other instructions, and the rule declared in the case of *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202. In that case it was said: "That the negligence of the plaintiff ceases to be the proximate cause of the injury when the defendant has opportunity to prevent it, and, with knowledge of the exposed condition of the plaintiff, negligently refuses to do so, is well settled in this state." If appellant's motorman could have seen appellee in time

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to stop the car (and it was a question for the jury to determine from the evidence whether or not he could have seen him), his failure to see would be negligence for which appellant would be answerable. The instruction is not subject to the objections urged.

It is next urged that the thirteenth instruction is erroneous (a) because it assumes that the car was not stopped or attempted to be stopped; (b) because it assumes

8. that the driver was in peril; and (c) because of the expression "the highest degree of care" as applied to the duty of the motorman, under the facts stated. We search the record in vain to find any fact even tending to show that the car was stopped or any attempt made to stop it.

Assuming that there was evidence tending to support all of the facts to which the court referred in this instruction, we do not think there was any error in directing the

9. jury that under such facts the motorman was charged with the exercise of the highest degree of care.

In *Lake Erie, etc., R. Co. v. Juday* (1898), 19 Ind. App. 436, the question under consideration was embraced in the quotation from that case which appears in a former part of this opinion.

In the case of *Gagg v. Vetter* (1872), 41 Ind. 228, 242, the court quoted from *Kelsey v. Barney* (1855), 12 N. Y. 425, and approved the following: "Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."

The fourteenth instruction of which appellant complains, and against which counsel urge some objections, seems to

us so clearly and fairly to state the law applicable to the facts that we do not deem it either necessary or important to take up the objections and discuss them separately. The instruction is a correct statement of the law.

One of the reasons assigned for a new trial was that the assessment of damages was too large. The judgment was for \$1,000. There is nothing in the record to indi-

cate that the jury, in fixing the amount of the damages, was improperly influenced by prejudice or partiality.

The other questions discussed by counsel relate to the admission and rejection of certain evidence. Without referring to such evidence, after having carefully considered the questions involved, we have reached the conclusion that no reversible error was committed.

Judgment affirmed.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY v. ROBBINS, ADMINISTRATOR.

[No. 5,415. Filed December 15, 1905. Rehearing denied April 27, 1906. Transfer denied June 5, 1906.]

1. **PLEADING.**—*Complaint.*—*Railroads.*—*Negligence.*—*Different Acts of.*—*Whether Joint or Several.*—A complaint alleging that defendant railroad company negligently ran its train at an excessive rate of speed, that it failed to sound its whistle, that it failed to ring its bell, and that plaintiff's decedent was killed on defendant's highway crossing by reason of the negligence "as aforesaid," relies upon such negligent acts severally and not jointly, and proof of one of such acts sustains such complaint. *Southern R. Co. v. Jones*, 33 Ind. App. 333, distinguished. p. 174.

2. **APPEAL AND ERROR.**—*Weighing Evidence.*—*Railroads.*—*Signals.*—*Question for Jury.*—Where the evidence as to a railroad company's sounding its whistle at a highway crossing is conflicting, the verdict is conclusive on appeal. p. 176.

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3. **EVIDENCE.—Positive.—Negative.—Weight.**—It cannot be held as a matter of law that the positive evidence of a witness of the happening of a fact is entitled to greater weight than the negative evidence of another witness that he was in a place to know of such fact if it had happened and that such fact did not take place. p. 176.
4. **SAME.—Judicial Notice.—Railroads.—Noise.—Presumptions.**—While the courts judicially know that a moving train makes a noise, the presumption does not exist that such noise is sufficient for an ordinarily prudent person to hear and avoid a collision at a highway crossing. p. 179.
5. **NEGLIGENCE.—Contributory.—Railroads.—Highway Crossings.**—Whether a wife riding in a wagon with her husband who was driving was guilty of contributory negligence in crossing a railroad after dark when she could have seen an approaching train only a portion of the time and might or might not have heard it by stopping and listening, is a question for the jury. p. 180.
6. **SAME.—Contributory.—Railroads.—Signals.—Care Required by Traveler.—Question for Jury.**—It is the duty of the traveler to watch in both directions on approaching a railroad crossing for passing trains, and the failure of such company to sound its whistle should be taken into consideration with all other facts by the jury in determining the question of contributory negligence. p. 180.
7. **RAILROADS.—Highway Crossings.—Traveler on Crossing.—Presumption.**—The presumption is that a traveler will not knowingly or voluntarily attempt to cross a railroad in view of imminent danger. p. 181.
8. **SAME.—Highway Crossings.—Signals.—Contributory Negligence.**—The failure by a railroad company to sound the statutory signals at a highway crossing does not relieve a traveler from the exercise of reasonable care. p. 182.
9. **APPEAL AND ERROR.—Instructions Requested Covered by Those Given.**—Where instructions requested are covered by those already given, a refusal to give those requested is not erroneous. p. 182.
10. **NEGLIGENCE.—Contributory.—Burden of Proof.—Evidence.**—The burden of proving contributory negligence is upon the defendant, but the whole evidence should be considered on such question. p. 182.
11. **SAME.—Contributory.—Imputing Husband's to Wife.**—Where a wife was riding in a wagon driven by her husband, the fact that she was the wife is not alone sufficient to impute his negligence to her and thus preclude her administrator from a recov-

ery for her death caused by the negligence of the railroad company. p. 183.

12. NEGLIGENCE.—*Contributory.—Imputing.—Railroads.—Highway Crossings.*—A wife riding with her husband who controls the wagon is not thereby relieved from the exercise of ordinary care for her own safety in crossing a railroad. p. 183.
13. EVIDENCE.—*Photographs.*—Photographs of a highway crossing when identified are admissible in evidence in a railroad crossing accident case, the point of view from which taken going to their weight as evidence and not to their competency. p. 183.

From Whitley Circuit Court; *Luke H. Wrigley*, Special Judge.

Action by Elam Robbins, as administrator of the estate of Bertha Sherburn, deceased, against the New York, Chicago & St. Louis Railroad Company. From a judgment on a verdict for plaintiff for \$2,000, defendant appeals. *Affirmed.*

Walter Olds, N. D. Doughman, Charles M. Niezer and John H. Clarke, for appellant.

A. A. Adams, Bertram Shane, P. S. Webster, A. G. Wood and F. E. Bowser, for appellee.

ROBINSON, J.—In appellee's second paragraph of complaint for damages for the death of his decedent it is averred that appellant, by its servants, negligently

1. drove the engine and train at an excessive and dangerous rate of speed; that the whistle was not sounded as required by statute; that the bell was not rung; and that the accident was caused by the "negligence of said defendant and its said servants as aforesaid." The complaint does aver several acts of negligence, but it does not proceed upon the theory that the injury was the result of the combined effect of all the acts of negligence charged. Negligence would be established by showing that appellant failed to give the signals required by statute, whether any other acts of negligence that might be charged should be made out by the proof or not. The fact that the pleading says that

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the accident was caused by the negligence "as aforesaid," does not necessarily mean that the accident was caused by all the acts of negligence charged.

In *Southern R. Co. v. Jones* (1904), 33 Ind. App. 333, cited by appellant, the complaint alleged as negligence the use of defective brakes and running the train in excess of the speed limited by a city ordinance. The allegation was: "That by reason of the carelessness and negligence of said defendant in failing and neglecting properly and securely to supply said caboose with good, sound, safe, and secure appliances, whereby the speed of the same could be controlled, and by reason of the carelessness and negligence of said defendant in running its said train at such high rate of speed, to wit, twenty miles per hour, within the corporate limits of said city of Huntingburg, and thereby causing said collision as aforesaid, he received his said injuries, and not otherwise." It was held that the injury is stated to be due to the two causes named. The court recognizes the rule that, as a general rule, all acts of negligence averred need not be proved, but says: "It is not averred that the brake would have been insufficient to check the caboose if it had been going at the rate of only eight miles an hour [the ordinance rule]. It may be fairly inferred that if the caboose had not been going at an unlawful rate of speed the brakes would not have been insufficient, or that if the brakes had not been defective the high rate of speed could have been checked; in other words the high rate of speed rendered the brakes useless."

There is no necessary connection between the several acts of negligence attempted to be alleged, and there is nothing in the pleading to indicate that it proceeds upon the theory that all the alleged acts of negligence combined caused the accident. If the attempted averments of negligence, aside from the allegation of failure to give the statutory signals, should be omitted from the pleading, the averment that the accident was caused by the negligence

“as aforesaid” would be applicable. We see nothing in the pleading to take the case out of the general rule that has long prevailed that a plaintiff may plead in one paragraph different acts of negligence, and upon the trial it is sufficient if he prove such negligence charged as will establish his case, and this may be a single act of negligence. There was no error in overruling the demurrer to the second paragraph of complaint.

Under the motion for a new trial it is first argued that the evidence fails to show appellant guilty of negligence.

The court instructed the jury that there was no evidence before them that would warrant them in finding for appellee on the ground that appellant was negligent as to ringing the engine bell, or as to the rate of speed at which the train moved as it approached the crossing. In another instruction the jury were told that the only ground upon which, if at all, appellant could be held liable, was negligence in failing to sound the whistle as required by statute.

The accident happened at a crossing east of the town of Kinzie. There is another north-and-south highway crossing in Kinzie. It is 2,855 feet between the two crossings. About 1,500 feet west of the east crossing, where the accident happened, is the whistling post for that crossing. Witnesses who lived at Kinzie and in the vicinity testified as to the sounding of the whistle. A number of witnesses testified positively that the whistle was sounded and that they heard it. Other witnesses testified that the whistle was not sounded, that they were where they could have heard it if it had been sounded, and that they did not hear it. It is insisted by counsel for appellant that the evidence

of witnesses who testified that they did not hear the signals—and from that fact state that the signals were not given—is overcome by the positive evidence of witnesses that the signals were given. It cannot be said, however, that the testimony of all of appellee’s witnesses

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upon the question of signals was purely negative. One of these witnesses testified that as she approached the crossing on the north-and-south road she heard the signal for that crossing; that she saw the train and stopped ten or fifteen feet from the track and waited for the train to pass and immediately walked on and watched the train until it got out of sight; that she had gone just a little way when she heard the three whistles. Another witness, mother of the station agent, testified that she lived about seventy feet from the track just east of the station, and was sitting on her porch and saw the train go by. She heard it approaching from the west; it whistled for the west crossing; that she did not hear any whistle for this crossing, but heard it give three whistles; did not know what that meant, and walked out toward the railroad and saw the agent and asked him. Another witness testified that he was in a buggy, driving north on the north-and-south road, and was about eighty rods south of the railroad when the train passed through Kinzie; that it did not whistle for the east crossing; that it gave three sharp blasts after it passed the crossing; that he was paying particular attention to the train, as he was watching to see if his brother-in-law, who was traveling at that time, had come home that night; that he noticed to see if the train would whistle or if it was slacking in speed. It cannot be said that this evidence was of a purely negative character. The jury could properly give more weight to such testimony than to the testimony of witnesses who simply testified that they did not hear the signals, but were where they could have heard them had they been given. "It may be true," said the court in *Ohio, etc., R. Co. v. Buck* (1892), 130 Ind. 300, "in fact, that, under some circumstances, greater weight should be given to the positive statement of one witness than to the negative statement of another, but it depends upon the circumstances, and is not true as an abstract proposition of law." And in the case at bar the circumstances surrounding these witnesses

at the time when they say that the signals were not given take from their testimony something of its negative character, and while their testimony under such circumstances would not be entitled to as much weight as the testimony of witnesses who state positively that they heard the signals given, yet, with this evidence, it cannot be said that there was no evidence authorizing the jury to say that the signals were not given. As we view this testimony, we could not disturb the jury's conclusion without weighing the evidence, and this we cannot do. The following cut will doubtless be instructive:



Camera 117 feet north of center of crossing looking west, engine 1,500 feet west of center of crossing.

It is also argued that decedent was guilty of contributory negligence. At the crossing the highway and railroad form an angle of twenty-six and three-fourths degrees; the railroad running in a northwesterly and southeasterly direction over the highway running east and west. From the crossing the highway slopes to the east and at 100 feet is three and seven-tenths feet lower than the railroad. The fence on the north side of the highway was a rail fence, the right-of-way fence was wire, with a board at the top, and the wing fence west of the crossing and extending up

to the cattle-guard was a board fence about four feet high. The railroad is straight for 350 feet west of the crossing, and from that point curves toward the west in a two-degree curve, which ends about 1,200 feet west of the crossing. The grade of the railroad track rises as it goes west for about 1,500 feet and at 1,000 feet west of the crossing the track is eight feet higher than the crossing, and at 500 feet is four feet higher. There was a bank on the north of the railroad track to the west of the crossing, and between that point and a point 840 feet west the extreme height of the bank was nine feet above the rails; this height extended 175 feet, and then gradually receded to the east until it reached the line of the track west of the crossing. There was a bank six feet high on the south side of the track west of the highway. The telegraph poles were on the north side of the track. Decedent approached the crossing from the east, seated on a spring seat in an ordinary farm wagon drawn by two horses driven by her husband. Her eyes were about six feet from the ground. The accident happened about 7:30 o'clock in the evening of August 21. It was dark at the time. When last seen before the accident, and as they were approaching the crossing and were about sixty rods from the crossing, decedent and her husband were sitting on the spring seat of the wagon, the husband on the right and decedent on the left. The husband was driving, and decedent was carrying her child, about sixteen months old. All three were killed in the accident. Decedent lived about four miles north of Kinzie, and had crossed the crossing that morning going in the opposite direction. It does not appear that she was familiar with the crossing.

The jury find that the train was running fifty miles an hour. Cases are cited to the effect that a court must know that a train of cars passing over iron rails at that

4. rate of speed does not do so without noise, and from this it is argued that it is presumed that the train

would make sufficient noise for one of ordinary hearing to hear it far enough away to avoid a collision with it. If this presumption exists, there is no necessity for the statutory crossing signals. See *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 375. Courts do know that such a train would make a noise, but they also know that whether the noise could be heard by one approaching the crossing and at what distance it could be heard depend upon circumstances and present conditions which at once suggest themselves and with which the traveler has nothing to do.

Without enumerating all the conditions existing at

5. the time of this accident, but taking into consideration the topography of the country surrounding the place of the accident, the direction from the approaching train in which the decedent approached the crossing, the obstructions between her and the approaching train, all as disclosed by evidence, we cannot say as matter of law that she necessarily heard the approaching train in time to avoid the injury. There is evidence that as decedent approached near the crossing there were places from which a train approaching from the west could have been seen, and that there were places from which it could not have been seen.

It was the duty of decedent to watch for trains

6. coming from the west and also from the east. The crossing signals were not given; and, while this did not excuse the decedent from the exercise of ordinary care, the jury had the right to take that fact into consideration in determining whether the decedent did exercise the degree of care required. At the rate of speed the train was moving it passed from the whistling post, where the signals should have been given, to the crossing in about twenty seconds. It is not shown at what rate decedent was traveling; but, accepting counsel's conclusion from the evidence that she was traveling five miles an hour, she was 150 feet from the crossing at the time the signals should have been given. Without these signals it cannot be said that she

must necessarily have heard the noise of the approaching train, had she listened. The jury find that for a part of the distance as she approached the crossing she could not see the headlight of the engine on account of the curve and embankments. At some points in this distance she could have seen the headlight if she had looked in that direction. But she was under no greater obligation to watch for trains approaching from the west than for trains approaching from the opposite direction. The presumption is that a

person will not knowingly and voluntarily rush
7. into danger, and, as the evidence in this case is not such that it can be said that decedent must have heard the train had she listened, and must have seen the train had she looked, in time to avoid the injury, we think the question of her contributory negligence was properly left to the jury.

Evidence was introduced to the effect that from certain points in the highway the track of appellant's road could be seen for certain distances, and it is argued from this that the approaching train could have been seen by decedent had she looked for it. The jury also answered a number of interrogatories concerning the same matters, but these answers are not altogether uncontradictory and conclusive. "It does not necessarily follow," said the court in *Massoth v. Delaware, etc., Canal Co.* (1876), 64 N. Y. 524, "from the fact that a skilled engineer can demonstrate that from a given point in a highway the track of a railroad is visible for any distance, that an individual in charge of a team approaching the track is negligent because he does not from the same point see a train, approaching at great speed, in time to avoid a collision; and it is not enough to disturb a verdict of a jury in this court, in which legal errors only can be corrected, that the questions of fact are doubtful and that a different result might have been reached." In the case at bar there is evidence in the record sustaining the

general verdict of the jury which finds the question of decedent's contributory negligence in appellee's favor.

The only objection made by counsel to the ninth instruction given to the jury is decided adversely to appellant in *Pittsburgh, etc., R. Co. v. Martin* (1882), 82 Ind.

8. 476; *Indianapolis, etc., R. Co. v. McLin* (1882), 82 Ind. 435; *Louisville, etc., R. Co. v. Williams* (1898), 20 Ind. App. 576, and cases cited. See *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398. This instruction is quite long, but it tells the jury the care required of the decedent as she approached the crossing, and that the failure of the appellant to give the signals required by statute did not relieve decedent from the exercise of such care.

Instructions two, eleven, fourteen and sixteen, requested by appellant, correctly state the law, but the substance of each of these instructions is contained in instructions eight and nine given to the jury.

In instruction eight the court properly told the jury that contributory negligence is a matter of defense which may be proved under the general denial, the burden of proving which rests upon the appellant; that whether there was negligence on the part of decedent that contributed toward producing her death, or negligence on the part of the husband which was imputable to her and which contributed toward her death, were matters as to which the burden of proof was upon appellant, but they were matters to be determined upon the whole evidence; and that if decedent was guilty of contributory negligence, or if her husband was guilty of negligence which was imputable to her, and which contributed to her death, appellee could not recover and the jury must find for appellant, even though they should find that appellant was negligent in failing to sound the whistle, and that such negligence was the proximate cause of the death of appellee's decedent.

If, in this case, the decedent's husband was negligent, a point we need and do not decide, and the decedent is charged with the consequences of his negligence,

11. it must be solely and alone because of that relationship. The complaint avers that the horses were driven by and were under the management and control of the husband, decedent "having no control of her said husband and no control or management of said horses and wagon." It is true the husband and wife may sustain such relations to each other that the negligence of one will be imputed to the other. But there is no evidence of any such relations in this case. All that is shown is the existence of the marriage relation, and that relation alone cannot have that effect. *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139; *Miller v. Louisville, etc., R. Co.* (1891), 128 Ind. 97. See *Town of Knightstown v. Musgrove* (1888), 116 Ind. 121.

The fact that decedent was riding with her husband, who had entire control of the team, did not relieve her of the duty of exercising care for her own safety; and

12. in the cases of *Aurelius v. Lake Erie, etc., R. Co.* (1898), 19 Ind. App. 584, and *Lake Shore, etc., R. Co. v. Boyts* (1897), 16 Ind. App. 640, liability was denied, not on the ground that the negligence of the driver was imputed to the injured person, but that the injured person himself failed to exercise the care required of a person approaching a crossing.

There was no error in admitting in evidence certain photographs of the crossing and surroundings. The witness who took the photographs testified that they

13. were correct reproductions of the surroundings as they were then. The points from which the photographs were taken would go to their value as evidence in the particular case, but not to their admissibility, where a witness testifies that they are correct reproductions of the surroundings. *Miller v. Louisville, etc., R. Co.* (1891),

128 Ind. 97; *Keyes v. State* (1889), 122 Ind. 527; *Huntington Light, etc., Co. v. Beaver* (1905), 37 Ind. App. 4.

Judgment affirmed.

MCCASLIN ET AL. v. THE STATE.

[No. 5,440. Filed October 31, 1905. Rehearing denied January 4, 1906. Transfer denied June 5, 1906.]

1. APPEAL AND ERROR.—*Briefs*.—*Waiver*.—Alleged errors not discussed are waived. p. 185.
2. LIMITATION OF ACTIONS.—*State*.—*Statutes*.—By the statute of 1852 (2 R. S. 1852, p. 78, §224) the State was barred in civil cases by the statute of limitations the same as other litigants, but since 1881 (§305 Burns 1901, §304 R. S. 1881) the State is barred only as to sureties. p. 186.
3. PLEADING.—*Complaint*.—*Quieting Title*.—*Prescription*.—*State*.—A complaint to quiet title filed in 1903 and alleging that plaintiff has held undisputed and adverse possession of real estate for thirty-eight years is insufficient as against the State, since it fails to show such possession for twenty years continuously prior to 1881. p. 186.
4. SAME.—*Complaint*.—*Quieting Title*.—*Prescription*.—*State*.—A complaint to quiet title alleging 'that plaintiff took exclusive possession of such real estate in 1860 and that the State's claim of title is unfounded and is a cloud thereon, is bad since it fails to show that plaintiff held such possession any length of time after acquiring it. p. 187.
5. TRIAL.—*Venire de novo*.—*Time for Motion*.—A motion for a *venire de novo* made after final judgment should be overruled because too late. p. 188.
6. QUIETING TITLE.—*State*.—*Statutes*.—Section 7164 Burns 1901, Acts 1883, p. 170, §9, providing a remedy for the State to pursue to secure possession of its lands, is not applicable to a case to determine the title to lands, such question being for adjudication by the courts. p. 188.
7. NEW TRIAL.—*Defective Verdict*.—*Venire de novo*.—A new trial cannot be demanded because of a defective verdict, a motion for a *venire de novo* being the proper remedy. p. 189.

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From Boone Circuit Court; *S. R. Artman*, Judge.

Suit by the State of Indiana against William McCaslin and another. From a decree for plaintiff, defendants appeal. *Affirmed*.

Pliny W. Bartholomew, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild* and *W. C. Geake*, for appellee.

MYERS, P. J.—Appellee begun this suit against appellants in the Superior Court of Marion County by filing a complaint in three paragraphs. Thereafter the venue was changed to the Boone Circuit Court, where the case was tried before a jury, verdict returned, and judgment rendered in favor of appellee.

The first and second paragraphs of complaint are in the ordinary form, the first demanding possession of, and the second praying that appellee's title be quieted to, 100 acres of land in Marion county, Indiana. The third paragraph is to quiet title, and avers the facts in detail, upon which judgment is sought. A great number of pleadings were filed in the case, but we shall only notice those upon which a question is presented for our consideration.

(1) It has been held a number of times by the Supreme Court and this Court that only such questions as are discussed by the parties asserting error on appeal will

1. be considered. All other questions will be deemed to have been waived. *Hoover v. State* (1903), 161 Ind. 348; *Smith v. Borden* (1903), 160 Ind. 223; *Clear Creek Stone Co. v. Dearmin* (1903), 160 Ind. 162; *Franklin v. Lee* (1902), 30 Ind. App. 31; *City of Greenfield v. Johnson* (1902), 30 Ind. App. 127.

(2) Appellant William McCaslin insists that the court erred in sustaining appellee's demurrer to the second and third paragraphs of his cross-complaint. Omitting the formal parts of the second paragraph, William McCaslin avers "that he has been the owner in open, notorious,

unequivocal, continuous and exclusive possession of the real estate described as follows, to wit: [describing the real estate by metes and bounds] containing 100 acres, for the last thirty-eight years or more; that the plaintiff in this cause is claiming some interest therein, and this cross-complainant prays that his title in and to said above-described real estate be quieted, and for any and all proper relief herein." The material allegations of the third paragraph are as follows: "William McCaslin states that on or about 1860 he entered into the open, notorious, unequivocal and exclusive possession of the following described real estate, to wit: [describing the lands by metes and bounds] containing 100 acres, and as such owner his title is under a cloud, for the reason that the plaintiff herein claims to own the same as against this defendant, and he prays that his title to the same be quieted, and for all proper relief in the premises." It is apparent that in both of these paragraphs William McCaslin bases his title and right to the real estate as against appellee upon the doctrine of title by prescription or adverse possession.

Section 224, 2 R. S. 1852, p. 78, provides: "Limitation of actions shall bar the State of Indiana and the United States as other persons." This limitation continued

2. in force until September 19, 1881, and since that time the common-law rule has prevailed, except as to sureties. §305 Burns 1901, §304 R. S. 1881; *State, ex rel.; v. Halter* (1898), 149 Ind. 292.

While appellant William McCaslin avers in the second paragraph of his cross-complaint that he had the continuous possession of said real estate for thirty-eight years,

3. it does not appear that he had such possession for twenty years prior to September 19, 1881, and if the rights of the State were not barred at that time, whatever rights it had then continued unaffected by appellants' possession. This paragraph was filed April 23, 1903, and under its averments we think it insufficient to show a bar as

against the rights of the State, by reason of the twenty-year limitation statute.

By the averments in paragraph three, it appears that on or about the year 1860 he took exclusive possession of said real estate, but for what time or

4. how long he continued in such possession does not appear.

In *Worthley v. Burbanks* (1897), 146 Ind. 534, it is said in the syllabus that in order to constitute adverse possession five indispensable elements must appear: “(1) It must be hostile and under a claim of right. (2) It must be actual. (3) It must be open and notorious. (4) It must be exclusive. (5) It must be continuous.” In support of this rule the court cites numerous authorities.

In *Peterson v. McCullough* (1875), 50 Ind. 35, the court said: “To acquire a right by prescription, there must be an actual enjoyment. Prescription acquires for the party precisely what he has possessed, and nothing more, and in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired. The use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in, over or out of which the easement prescribed for is claimed, and while such owner was able, in law, to assert and enforce his rights, and to resist such adverse claim, if not well founded.”

Applying the cases from which we have just quoted to the facts as they appear from the allegations of the second and third paragraphs of William McCaslin's cross-complaint, we are of the opinion that neither of these paragraphs is sufficient to withstand a demurrer for want of facts, and therefore we find no error in the ruling of the trial court.

(3) Appellants contend that their motion for a *venire de novo* should have been sustained. Upon an examination

of the record we find that on May 10, 1904, this
5. cause was regularly submitted to a jury for trial, and on the same day the following verdict was returned: "We, the jury, find for the plaintiff." On May 11, 1904, final judgment on the verdict in favor of appellee was rendered. On May 13, appellants filed a motion for a *venire de novo*, which was by the court overruled. There was no error in this ruling, as it has been held a number of times by the Supreme Court of this State, and by this Court as well, that a motion for a *venire de novo*, to be effective, must be made before final judgment, and when not so made no question is presented. *Bennett v. Simon* (1899), 152 Ind. 490; *Potter v. McCormack* (1891), 127 Ind. 439; *Shaw v. Merchants Nat. Bank* (1877), 60 Ind. 83; *Cannon v. Castleman* (1900), 24 Ind. App. 188; *Sloan v. Lick Creek, etc., Gravel Road Co.* (1893), 6 Ind. App. 584.

(4) Upon completion of the issues in this cause, and before the same were submitted to the jury for trial, appellants filed their joint motion for judgment upon

6. the pleadings, which motion was by the court overruled, and this ruling is here assigned as error. In support of this motion, appellants contend that §7164 Burns 1901, Acts 1883, p. 170, §9, provides the remedy the State shall pursue to secure possession of any of its lands unlawfully held or in the possession of any one, and controls and governs the State in its procedure in this case. This section of the statute must be construed in connection with the whole act, of which it is a part. This statute was enacted by the General Assembly in 1883 (Acts 1883, p. 170, §7156 *et seq.* Burns 1901), and provides for the sale and conveyance of certain lands belonging to the State, prescribing the duties of the Auditor of State and county auditors in that regard, and the manner of putting the purchaser of such land in possession of the same. This statute has reference to possession of the State's lands, and is not

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applicable where the question of title is involved. It cannot be said that the General Assembly, by summary proceedings, as provided by §7164, *supra*, intended that any one of its citizens, in the possession of property or lands to which he has title, shall be thus summarily ejected without due process of law, and yet such would be the effect if appellants' contention should prevail. The authority of the Auditor of State over the State's lands and to deal therewith is purely statutory, and the statute must be strictly followed. He is given no authority to adjudicate the question of title as between the State and one of its citizens. Such rights are to be settled by the judicial department, and for this purpose the courts of the State are open alike to the State and its citizens.

(5) Appellants' motion for a new trial was overruled by the trial court, and this ruling is assigned as error.

The evidence and instructions given the jury are

7. not in the record, and the only causes for a new trial here insisted upon are: (1) That the verdict of the jury is defective, in that it does not cover the issues in the case; (2) because the jury was discharged by the court without having returned a verdict upon which judgment could be rendered. It does not appear from the record that any motion was made or any steps taken in the court below to correct or modify the judgment, or that any objection was made or reason assigned why the court should not render judgment on the verdict until after its rendition, and then only by a motion for a *venire de novo*. The rule is well established in this State that a motion for a new trial does not reach a defective verdict. *Bohr v. Neuenschwander* (1889), 120 Ind. 449, and cases cited. In *Cottrell v. Shadley* (1881), 77 Ind. 348, the court said: "Where a verdict is imperfect by finding less than the whole matter put in issue, the proper remedy is a *venire de novo*." Under the authorities last cited, we are of the opinion that

the court did not err in overruling appellants' motion for a new trial.

Finding no error in the record, the judgment of the trial court is affirmed.

ANDERSON v. CITIZENS NATIONAL BANK.

[No. 5,533. Filed February 2, 1906. Rehearing denied April 18, 1906. Transfer denied June 5, 1906.]

1. HUSBAND AND WIFE.—*Disabilities of Wife.—Partnership.—Estoppel.*—Section 6960 Burns 1901, §5115 R. S. 1881, abolishing, with certain exceptions, the disabilities of married women, authorizes a wife to engage in partnership with her husband, and money borrowed by such partners for use in such business may be recovered from either. p. 191.
2. SAME.—*Representations.—Estoppel.*—A married woman, borrowing money on the representation that it was to be used in a partnership business of which partnership she was a member, is estopped under §6962 Burns 1901, §5117 R. S. 1881, from asserting the defense of suretyship. p. 193.
3. TRIAL.—*Answers to Interrogatories.—When Controlling.—Presumptions.*—Answers to interrogatories to the jury control the general verdict only when in irreconcilable conflict therewith, the presumptions all being in favor of the general verdict. p. 193.
4. SAME.—*Answers to Interrogatories.—Irreconcilable.—Test.*—Answers to interrogatories to the jury are irreconcilable with the general verdict only when such answers together with all other facts provable under the issues cannot be consistent with such general verdict. p. 193.
5. HUSBAND AND WIFE.—*Partnership.—Debts of.—Borrowing Money to Pay.—Suretyship.*—Money borrowed by a husband and wife, who constitute a trading partnership, for the payment of an antecedent note due from such partnership, but signed by the husband alone, may be recovered from either, such wife being a principal and not a surety thereon. p. 193.

From Montgomery Circuit Court; Jere West, Judge.

Action by the Citizens National Bank of Crawfordsville against Rachel J. Anderson. From a judgment for plaintiff, defendant appeals. *Affirmed.*

M. E. Clodfelter, for appellant.

Finley P. Mount, for appellee.

ROBINSON, J.—Each of appellee's two paragraphs of complaint is based upon a promissory note executed to appellee by appellant and her husband. Appellant answered coverture and suretyship. Appellee replied in six paragraphs, the first of which was the general denial. The other paragraphs of reply are to the effect that the money was loaned to appellant and her husband upon the representation of appellant that she and her husband were partners in the cattle business, and that the money was to be used by them in the purchase of cattle. Appellee relied upon the representations so made, and believed them to be true, and was induced thereby to make the loans, and that without such representations appellee would not have made the loans nor advanced the money. Appellant and her husband were at the time partners in the cattle business, and she, with her husband, purchased a large number of cattle and owned the same as a partner with her husband at the time of his death, and after his death she took and received one-half of the proceeds of such cattle so owned by her and her husband as partners. The note sued on in the second paragraph of complaint was for the amount of an overdraft by appellee on her individual account. Demurrers to each of the affirmative paragraphs of reply were overruled. A trial by jury resulted in a verdict for appellee, with which the jury returned answers to interrogatories.

There is nothing in the statute that prevents a married woman from becoming a partner in business with her husband. A married woman may contract as a *feme*

1. *sole* except in such cases as the statute forbids.

Section 6960 Burns 1901, §5115 R. S. 1881, provides: "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." The exceptions which constitute the ex-

press restraints upon her right to contract are, that she cannot convey or mortgage her real estate, and that she cannot become a surety. §§6961-6963 Burns 1901, §§5116-5118 R. S. 1881. And the statute expressly provides that she shall be bound by an estoppel *in pais* like any other person. It has often been held that a married woman may borrow money to carry on her separate business, or to prevent the sacrifice of her property. And it has been held that the husband may maintain an action against the wife for money borrowed by her from him for use in her separate business and which she expressly promised to repay. "If she does voluntarily borrow from him," said the court in *Harrell v. Harrell* (1889), 117 Ind. 94, "under an express contract, and there is neither fraud nor oppression nor any injustice, no valid reason exists why she should not be compelled to repay him, for he is her creditor."

The statute neither authorizes a married woman to enter into a business partnership with another person, nor does it prohibit her from doing so. And it is held in *Burk v. Platt* (1882), 88 Ind. 283, that by §6967 Burns 1901, §5122 R. S. 1881, coverture is no bar to a married woman's contracting debts in carrying on any business on her separate account or as partner with another, and that her separate real estate and personal property may be levied upon and sold to satisfy a judgment against her and her copartner for debts contracted in carrying on the partnership business. See *Conant v. National State Bank* (1889), 121 Ind. 323. The legislature evidently contemplated that a wife might form a business partnership, not only with a third person but with her husband, as it is provided by §6967, *supra*, that a husband shall not be liable for any debts contracted by his wife in carrying on any business on her separate account, "or when she is in partnership with any person other than himself." See *Arnold v. Engleman* (1885), 103 Ind. 512; *McLead v. Aetna Life Ins. Co.* (1886), 107 Ind. 394; *Chandler v. Spencer* (1887), 109

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Ind. 553; *Elliott v. Gregory* (1888), 115 Ind. 98; *Young v. McFadden* (1890), 125 Ind. 254; *Wilson v. Wilson* (1888), 113 Ind. 415.

Appellant could become the business partner of her husband, and is bound by an estoppel *in pais* as any other person. Her representations to the bank that she

2. was such partner and was borrowing money with her husband to be used in the partnership business were as binding upon her as if she were a *feme sole*.

Counsel for appellant argue that the answers to the interrogatories show that appellant received no part of the consideration for the note sued on in the first para-

3. graph of complaint. It has been many times held that special answers cannot control and overthrow the general verdict unless they are in irreconcilable conflict with it; that the answers cannot be aided by any presumptions, but that all presumptions will be indulged to sustain the general verdict. "In determining whether there is such a conflict," said the court in *City of*

4. *Ft. Wayne v. Patterson* (1891), 3 Ind. App. 34, "the evidence actually introduced will not be examined; and if, taking all the special findings together and adding to them any other fact that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answers to interrogatories will not be allowed to control." See *Cook v. Howe* (1881), 77 Ind. 442; *Pennsylvania Co. v. Smith* (1884), 98 Ind. 42; *Davis v. Reamer* (1886), 105 Ind. 318; *Shoner v. Pennsylvania Co.* (1892), 130 Ind. 170; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139.

If a part of the money borrowed by appellant and her husband was used to pay off a note or notes upon which the name of the husband alone appeared as maker,

5. and the money procured on the old note or notes was borrowed for and used by the partnership, and under the issues this may have appeared from the evidence,

it could not be said that appellant received no consideration for the new note. As against the general verdict the interrogatories do not show that the antecedent debt was not a partnership debt, nor do they exclude the possibility of appellant's ever having received any benefit in person or estate from the execution of the new note.

No argument is presented by counsel that the verdict of the jury is not supported by evidence, or that the amount of recovery is too large. The instructions were full and correctly stated the law. Upon a careful consideration of the whole record we find no error prejudicial to appellant's rights, but it appears that the case was fairly tried and correctly decided upon its merits.

Judgment affirmed.

NEW CASTLE BRIDGE COMPANY v. STEELE.

[No. 5,717. Filed June 6, 1906.]

1. TRIAL. — *Pleading.* — *Proof.* — *Variance.* — *Negligence.* — Where the complaint alleges injuries caused by the negligence of defendant in the use of rotten and insufficient timbers in a derrick and the proof shows injuries caused by the breaking of an iron hook connecting a guy wire to the top of the mast, there is a fatal variance. p. 195.
2. APPEAL AND ERROR. — *Answers to Interrogatories.* — *New Trial.* — Where the record on appeal is such that the Appellate Court cannot say that plaintiff cannot recover, a new trial will be ordered, although technically the defendant would be entitled to judgment on the answers to the interrogatories to the jury. p. 195.

From Marion Circuit Court (12,494); *Henry Clay Allen*, Judge.

Action by William F. Steele against the New Castle Bridge Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

Elmer E. Stevenson, for appellant.

John M. Bailey and *W. E. Bailey*, for appellee.

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ROBY, J.—Action by appellee for the recovery of damages on account of personal injuries alleged to have been caused to him by appellant's negligence. The complaint is in four paragraphs; the issue was made by general denial. Trial resulted in a verdict for \$2,000. Appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict, was overruled, as was also its motion for a new trial.

Appellee was an employe of the appellant as a laborer and was injured by the fall of a derrick. The answers to interrogatories state that the derrick fell because

1. of the breaking of an iron hook connecting a guy wire to the top of the mast. The negligence alleged in the complaint is that the timbers of the derrick were rotten and insufficient. In that connection it is averred that the derrick had, by reason of long use, become weak, cracked and rotten in all its parts, including attachments at both ends, but if such averments can be considered as counting upon the defective hook, such construction will not avail appellee, there being no evidence that the defect in the hook was discoverable by inspection. The jury, in answer to interrogatories, say that the hooks were in good condition when put up; that they had been in use about two years, and that it was ordinarily safe to use said hooks for from twelve to fifteen years, and that they were apparently in good condition just before the accident. There being no negligence shown in regard to the inspection of the attachment which broke, there was no basis for a verdict, an employer not being bound to guard against dangers of a character he cannot foresee, in the exercise of reasonable care. *Lake Shore, etc., R. Co. v. Kurtz* (1894), 10 Ind. App. 600.

We are not prepared to say that the appellee

2. should not recover, and for that reason a new trial will be ordered.

Judgment reversed, and cause remanded, with instructions to sustain appellant's motion for a new trial and for further consistent proceedings.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY
COMPANY v. IRONS.

[No. 5,621. Filed June 6, 1906.]

1. CONSTITUTIONAL LAW.—*Railroads.—Fences.—Police Power.*—The legislature may, in the exercise of the police power, compel railroad companies to fence their rights of way. p. 197.
2. APPEAL AND ERROR.—*Weighing Evidence.—Railroads.—Fences.—Sufficiency of, to Turn Stock.—Question for Jury.*—Whether a fence repaired by a railroad company along its right of way is sufficient to turn stock as required by §5325 Burns 1901, Acts 1885, p. 224, §3, is a question of fact for the jury, and its verdict is conclusive on appeal where the evidence is conflicting. p. 197.
3. RAILROADS.—*Fences.—Attorneys' Fees.—Statutes.*—Where the record shows that plaintiff's attorney filed his suit, prosecuted it to a decision and that a reasonable fee was a certain sum, a judgment making an allowance for such attorney is sustained by the evidence. *Terre Haute, etc., R. Co. v. Salisbury, ante*, 100, followed. p. 198.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Suit by Thomas Irons against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

E. C. Field, *H. R. Kurrie* and *Guenther & Clarke*, for appellant.

Joseph Combs, for appellee.

ROBINSON, C. J.—Suit by appellee for the cost of repairing or rebuilding a fence between appellee's property and appellant's right of way. Upon issues formed a trial resulted in a finding in appellee's favor for \$38.38, and \$25 attorney's fees—judgment for \$63.38.

The only question argued is that the finding is not sustained by sufficient evidence, both as to the amount allowed for building the fence, and as to attorney's fees.

The statute (§5323 Burns 1901, Acts 1885, p. 224, §1) requires that the railroad company shall erect and main-

Chicago, etc., *R. Co. v. Irons*—38 Ind. App. 196.

tain fences along its rights of way, that they may

1. be constructed of barbed wire, and that they shall

be sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs and other stock from getting on the track. The authority for requiring railroad companies to erect and maintain fences at the sides of their roads sufficient and suitable to prevent cattle, horses, mules, sheep, hogs, and other stock from getting upon them, is found in the general police power of the State to provide against accidents to life or property in any business or employment. *Indianapolis, etc., R. Co. v. Townsend* (1857), 10 Ind. 38; *Indianapolis, etc., R. Co. v. Kercheval* (1861), 16 Ind. 84; *Indianapolis, etc., R. Co. v. McKinney* (1865), 24 Ind. 283; *Peoria, etc., R. Co. v. Duggan* (1884), 109 Ill. 537, 50 Am. Rep. 619; *Missouri Pac. R. Co. v. Humes* (1885), 115 U. S. 512, 29 L. Ed. 463, 6 Sup. Ct. 110; *Minneapolis, etc., R. Co. v. Beckwith* (1888), 129 U. S. 26, 32 L. Ed. 585, 9 Sup. Ct. 207; *Minneapolis, etc., R. Co. v. Emmons* (1893), 149 U. S. 364, 37 L. Ed. 769, 13 Sup. Ct. 870; 1 Elliott, Railroads, §669; 3 Elliott, Railroads, §§1219, 1220.

There is evidence in the record that after the notice was given to repair the fence appellant made some repairs, and

that after the repairs were made the fence was a

2. barbed wire fence, such as the statute contemplates.

But there is also evidence that after the repairs were made the fence was not sufficient to turn stock as specified in the statute. If the fence, after the repairs were made by appellant, was sufficient to turn stock, any further work done on the fence by the landowner must be at his own expense; that is, if appellant had made the fence sufficient to turn stock it had complied with the statute. It may have made a barbed wire fence; but the question is, did it make a fence sufficient to turn stock? This was a question of fact at the trial. This court cannot undertake to harmonize the conflicting statements of the witnesses

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upon this question. There is evidence that after the fence was repaired by appellant it would not turn stock as required by statute. §5325 Burns 1901, Acts 1885, p. 224, §3.

Upon the question of attorney's fees, the point
3. argued was decided in the case of *Terre Haute, etc., R. Co. v. Salisbury* (1906), *ante*, 100.

Judgment affirmed.

VAN BUSKIRK v. SUMMITVILLE MINING COMPANY ET AL.

[No. 5,642. Filed June 6, 1906.]

1. JUDICIAL SALES.—*Title Transferred*.—The purchaser at a judicial sale receives only the title owned by the judgment debtor. p. 200.
2. SAME.—*Prior Injuries to Property Sold*.—*Caveat Emptor*.—The purchaser of property at a judicial sale is not entitled, as purchaser, to damages for injury to the property prior to such sale, the doctrine of *caveat emptor* applying to such purchases. p. 200.
3. SAME.—*Mechanics' Liens*.—*Lands Purchased under Foreclosure of, Title Relates to What Time*.—Where lands are purchased under a decree foreclosing a mechanic's lien, the title received relates back to the time of the inception of the lien. p. 201.

From Superior Court of Madison County; *Henry C. Ryan*, Judge.

Action by Frank Van Buskirk against the Summitville Mining Company and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

John R. Thornburg and *David L. Bishop*, for appellant.

Fred E. Holloway and *Frederick Van Nuys*, for appellees.

MYERS, J.—Appellant in the court below stated his cause of action against appellees in a complaint in two paragraphs. The first paragraph shows that on September 22, 1903, appellant became the owner of a natural gas well,

tubing, casing, fixtures, etc., by virtue of a deed executed by the sheriff of Madison county, Indiana, pursuant to and in compliance with an order of the Superior Court of Madison County in a mechanic's lien foreclosure proceeding instituted and carried on by appellant and Daniel Van Buskirk; that by virtue of a decree for the sale of the property, to satisfy a judgment for \$68.55, the sheriff of Madison county, on June 28, 1902, sold the same to appellant at his bid of \$25; that the property at the time of the sale was of the reasonable value of \$500; that after the sale, and before appellant received a deed therefor, appellees wrongfully and unlawfully, by pulling the tubing and casing from said well and by removing the fixtures attached thereto and converting the same to their own use, damaged and destroyed said property and rendered it wholly worthless and of no value, to the damage thereof in the sum of \$500. The second paragraph avers practically the same facts as stated in the first, except that it alleges that the injury to the property took place some time between the filing of the notice of intention to hold a lien and the day appellant received the sheriff's deed.

The issues were closed by a general denial to each paragraph of the complaint. The issues thus formed were submitted to a jury for trial, and at the close of appellant's evidence, at the direction of the court, the jury returned a verdict for appellees. Motion for a new trial overruled, and judgment on the verdict of the jury rendered in favor of appellees. Error in overruling appellant's motion for a new trial presents the only question for our decision.

Appellees suggest that the record does not affirmatively show that the bill of exceptions incorporating the evidence was filed with the clerk after the same was settled, and by the court ordered to be made a part of the record. From our examination of the record on this subject, we are of the opinion that the evidence is in the record, and that appellee's suggestion is not well founded.

Appellant, as reasons for a new trial, claims that the court erred in instructing the jury, over his objection, to return a verdict for appellees; that the verdict is not sustained by sufficient evidence and is contrary to law.

Appellant, in support of his complaint, introduced in evidence the original notice of intention to hold a mechanic's lien, and all the pleadings in the case wherein the lien was foreclosed, together with all the proceedings had thereon leading up to and including the sale of the property to him; also his deed from the sheriff, executed September 22, 1903. From the undisputed facts, it also appears that the Summitville Mining Company, the owner of the well in question, about three or four weeks prior to December 21, 1901, removed the tubing, casing and other fixtures from the well, and thereafter abandoned it; that the action to foreclose the mechanic's lien was commenced April 23, 1901, and judgment for \$68.55, and decree foreclosing the lien rendered March 4, 1902, and the property sold to appellant by the sheriff by virtue of said decretal order June 28, 1902; that appellant first learned of the worthless condition of the well September 23, 1903.

It is clear from the undisputed facts in this case that there has been no change in the condition of the property since the day of sale by the sheriff, and its purchase by appellant. It was sold at public vendue.

1. chase by appellant. It was sold at public vendue.

Appellant bid for and bought the interest of the Summitville Mining Company. The execution of the sheriff's deed perfected in him that interest. *Watts v. Sweeney* (1891), 127 Ind. 116, 22 Am. St. 615.

As a judicial-sale purchaser appellant's rights must be measured, for as such purchaser only does he make a claim.

He treats the sale as valid, and seeks to recover

2. damages for an injury done to the property prior to its purchase by him. As one of the lien holders, he was interested in preserving the property, to the end that payment of his claim might be coerced. The sale, un-

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redeemed from by the owner, freed the property from the lien, and from that time on his interest was that of a purchaser. From the day of the sale he assumed a new relation to the property, and the fact that he was a party to the decree under which the sale was made, will not benefit him in this action. As a bidder and purchaser of the property, his position was the same as a stranger, and he was bound by the rule of *caveat emptor*.

Appellant is not seeking to avoid the sale and recover the purchase money on account of fraud or for any other cause, consequently any claim here on that account

3. can have no bearing. His position, as we understand it, is based upon what the courts and law writers designate as the doctrine of "relation," whereby the title of a purchaser under a judicial sale relates back to the date of the lien. *Paxton v. Sterne* (1891), 127 Ind. 289; *Merritt v. Richey* (1891), 127 Ind. 400; *Jarrell v. Brubaker* (1898), 150 Ind. 260, 267. The doctrine of "relation" is applicable to the case at bar; for by it appellant's title to the property purchased by him from the sheriff is made to relate back to the day the mechanic's lien became effective. *Rorer*, Judicial Sales (2d ed.), §§191, 366. While this is true, it cannot be used or applied to defeat the elementary and well-settled rule of *caveat emptor*, nor to create additional rights outside of the subject of the purchase. Its real office being to secure to the purchaser the interest of the debtor or owner of the property or thing as sold, as of the date the lien attached, thereby "cutting out all intermediate transfers and encumbrances." 2 Dembitz, Land Titles, §174. We cannot give the doctrine of "relation" the effect and broad application appellant here claims for it, and not to do so is decisive of this appeal against appellant.

Judgment affirmed.

MINDNICH ET AL. v. KLINE ET AL.

[No. 5,781. Filed June 6, 1906.]

WATERS AND WATERCOURSES.—Obstructions.—Nuisance.—Drains.

—A judgment in a drainage proceeding is no defense to a suit to enjoin the maintenance of a dam in a watercourse, which has been running in a regular channel between well-defined banks from time immemorial, where such portion of such stream was not obliterated, superseded or deprived of its character as a natural watercourse by such judgment.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Suit by Mary E. Kline and others against Martin Mindnich and others. From a decree for plaintiffs, defendants appeal. *Affirmed*.

Spencer & Branyan, for appellants.

John Q. Cline, Claude Cline and Samuel E. Cook, for appellees.

BLACK, J.—This was a suit brought by the appellees against the appellants for damages because of the construction of two certain dams in the Little Wabash river, for the abatement of the obstructions, and for a decree perpetually enjoining the appellants from so obstructing the river.

The facts are shown by special findings. Appellee Mary E. Kline was the owner in fee simple of certain described real estate in Huntington county, being 107 acres bordering the south side of said river, less than one-half mile above, or up the stream from, the lands of the appellants hereinafter mentioned. Appellee Bridget Roche was the owner in fee simple of certain other lands, being eighty acres bordering the south side of the river, likewise less than one-half mile above the lands of the appellants. From time immemorial the Little Wabash river has been, and it still is, a natural watercourse, extending from a point five or six miles southwest of the city of Ft. Wayne, Allen county, in a southwesterly direction through that county and Huntington county, and along and through the

lands of the appellees and the appellants, until it empties into the Wabash river at a point about two miles southwest of the city of Huntington. The Little Wabash river always has been and is a stream and watercourse with a natural, distinct, and well-defined channel, with natural bed and banks from its head to its mouth. Along the lands of the appellees and of the appellants, as well as at other places above and below them, the river is from 125 to 150 feet wide. The lands of the appellees are level and flat, and they require drainage, and the river is the only outlet for the drainage thereof. A number of small streams and ditches pass through them and empty into the river, and the appellees have constructed numerous lateral open ditches and tile-drains for the drainage of their lands, and these empty into said small streams and ditches. All of the lands have rich soil and produce corn, wheat, oats and grass.

The appellants are the owners of certain lands lying on the north and south sides of the river, and extending across it, and including an island below the lands of the appellees. The island is located in the river opposite the other lands of the appellants, and is about fifty yards wide and one hundred and fifty yards long. At the island the channel of the river divides into a south branch and a north branch, the former channel being about seventy-five feet wide, running along the south side of the island, and the north branch being a channel about thirty feet wide, running along the north side of the island. From time immemorial both of these branches have been, and they now are, natural watercourses, and parts of the river, with natural and well-defined channels and beds and banks, and necessary to hold, contain and convey the water which naturally flows in the river and passes at that place.

July 1, 1883, one Branstrater and others filed in the Superior Court of Allen County a petition, under the drainage laws of this State, for the location and construc-

tion of a ditch or drain in and along the Little Wabash river, and such proceedings were had in that court in said cause that a ditch or drain was established and afterward constructed in and along the river from a point in Allen county to a point in Huntington county about two miles below and down stream from these lands of the appellees and the appellants. The bed of the river at and along the lands of the appellees and the appellants, and in both of the channels at the island, and for two miles below it, was and is composed of limestone rock. It was provided in said proceedings that the ditch should be about thirty feet wide in the bottom and about forty feet wide at the top, at and along this island, and the ditch was constructed of such width at that point. It was located along the north bank of the river for a mile or more below the island, and at the island it was continued along the north bank and in and along said north channel. After its construction there remained over seventy-five feet of the old channel of the river for a mile below the island, and at the island said south channel was left open and unobstructed, and the remainder of the natural channel below the island, as well as all of the channel on the south side of the island, was and is required and necessary to hold, carry and convey the water which naturally collects and flows in the river at that place.

The judgment of the Superior Court of Allen County does not limit the river to said artificial ditch, but "it was the intention of said court that said old channel above and below said island should be left open and unobstructed, and that all of said old channel on the south side of said island should remain open and unobstructed and as a part of said river; and that the object of said proceedings in said court was to enlarge said river at said island and at other points above and below the same." The lands of the appellees and of the appellants were assessed for the construction of said artificial ditch. For several years after the construction of the artificial ditch the old channel on the south side

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of the island remained open and unobstructed, as a part of the river, and was used to hold and carry the water passing in the river at that place.

After the construction of the artificial ditch, appellant Mindnich became the owner of the island and the other land to the north and south of it bordering on the river, and thereafter he opened up a stone-quarry in the river, in the bed of the channel south of the island and opposite the lower end thereof. He also entered the river and constructed a permanent dam across the south channel at the east or upper end of the island and at the west or lower end thereof. These dams were constructed of stone, dirt and other material; the upper one extending from the upper end of the island to the south bank of the river, a distance of about seventy-five or eighty feet, and being from six to seven feet high and completely closing up the south channel, so that the natural flow of the water of the river cannot pass through that channel, and the lower one extending from the lower end of the island to the south bank of the river, and both of the dams are as high as the banks of the river at said points. The dams were constructed by Mindnich for the purpose of keeping out of the south channel water that would naturally pass through it, and of preventing such water from passing through it, in order that he might operate the stone-quarry in the bed of the river.

Afterward the other appellant, the Huntington Consolidated Lime Company, purchased an interest in the stone-quarry and the land above mentioned, and both of the appellants have since been maintaining, and from time to time enlarging, the dams. By the construction and maintenance of the dams the appellants have reduced and taken away one-half of the size of the natural capacity of the river at the island. The artificial ditch on the north side of the island is wholly insufficient to hold and to carry the water which must pass at that point. The dams obstruct, greatly impede and check the natural flow of the water

and the current of the river at the island, and cause the water to congest, accumulate and back up at and above that point, by reason whereof the water of the river above the island is caused to rise above the banks thereof, and it spreads over the lands and fields of the appellees and floods and overflows the same, and is caused to stand and remain on said lands and fields, and thus to damage and destroy the wheat, grass and corn of the appellees, and the water in the river is caused to rise above the level of said small streams and ditches on the lands of the appellees, and the water backs therein and thus destroys the outlet for said lateral drains. It was found that the water backing up and flooding these lands had damaged grass, wheat and corn on the land of the appellee Kline of the value of \$10, and on the land of the appellee Roche of the same value. The court stated as conclusions of law that the appellants had no right to construct and maintain the dams in the south channel of the river; that the construction and maintenance thereof constituted a nuisance, and the appellees were entitled to have the same removed and abated within ninety days, and to have judgment against the appellants—the appellee Kline for \$10, and the appellee Roche for the same amount; also, that the appellants should be perpetually enjoined from obstructing the south channel of the river at the island; and that the appellees should recover their costs.

The court's conclusions seem so satisfactory and necessary, as being in accordance with principles firmly established and well understood, that there would be no occasion for discussion but for the claim on the part of the appellants that, as a result of the proceedings and judgment in the drainage proceedings in the Superior Court of Allen County, the south channel closed up by dams should be regarded as no longer being a portion of the river, and that the intervening space between the island and south shore of the river, inclosed between the two dams, should be

treated as land reclaimed through the drainage proceeding. This claim on the part of the appellants cannot be sustained. Leaving out of consideration all of the finding which may be said to constitute conclusions of law, there are sufficient facts to show that the portion of the river in question was not obliterated or superseded or deprived of its character as a natural watercourse by the drainage proceeding. It existed as such when the appellants became landowners in that locality, and when for their own private gain they constructed the obstructions, which constituted a nuisance, being an interference with the comfortable enjoyment of the lands of the appellees, which the court below rightly would not tolerate when its aid was properly invoked.

Certainly, it appears from the findings that the dams were erected in and across a place where the river had immemorially flowed as a natural watercourse, and the drainage proceedings shown in the findings do not appear therein to have changed the character of the place as a channel of such a stream and part of a river, whose waters the appellants had no right, by their obstructions, to cause to overflow the lands of the upper proprietors. Those proceedings, as appearing in the special findings, constituted no sufficient defense for the acts of the appellants shown by the findings.

Judgment affirmed.

KINGAN & CO. v. OREM ET AL.

[No. 5,465. Filed June 7, 1906.]

1. **NEW TRIAL.—Amount of Recovery.—Whether a Question of Law or Fact.—Appeal and Error.**—Where the evidence is conflicting as to the amount of recovery, the amount due is a question for the jury, and its verdict is conclusive on appeal; but where there is no dispute as to the facts, the question is for the court, whose decision may be reviewed on appeal. p. 209.

2. **PLEADING.—Complaint.—Sales.—Merchandise in Bulk.—Statutes.—Recovery.**—No recovery can be permitted upon a complaint asserting rights under the act of 1901 (Acts 1901, p. 505, §§6637a, 6637b Burns 1901), prohibiting the sale of merchandise in bulk except under certain conditions, since such statute is unconstitutional. p. 210.
3. **ESTOPPEL.—Statutes.—Unconstitutional.—Actions Under.**—Defendant is not estopped to assert that a statute is unconstitutional because he has acted under it as though it were valid. p. 210.
4. **PLEADING.—Complaint.—Guaranty.—Past-Due Accounts.—Consideration.**—A complaint declaring upon a written guaranty of a past-due account must show a valuable consideration therefor, an allegation that such guaranty was made "for a valuable consideration" being a conclusion and therefore insufficient. p. 210.
5. **NEW TRIAL.—Recovery too Small.—Insufficient Complaint.**—A new trial will not be granted because the amount of recovery is too small where the complaint is fatally defective. p. 211.

From Tipton Circuit Court; *J. F. Elliott*, Judge.

Action by Kingan & Co. against William Orem and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Kirkpatrick & Morrison and *W. R. Oglebay*, for appellant.

Blacklidge, Shirley & Wolf, for appellees.

ROBINSON, C. J.—Appellant's complaint against Orem, Chapman, and Gwinn is in two paragraphs. The first paragraph seeks to recover from Gwinn the value of a stock of goods sold to him by Orem & Chapman, on the ground that the goods were sold in bulk without complying with the act of 1901 (Acts 1901, p. 505, §§1, 2, §§6637a, 6637b Burns 1901) regulating sales in bulk. The second paragraph avers that on August 26, 1901, Orem & Chapman, as partners, were engaged in a retail grocery and meat business; that the firm was indebted to appellant \$141.69 for goods sold and delivered to the firm at its request; that on the above date the firm sold to Gwinn their entire stock for \$400 cash; that "on September 9,

1901, for a valuable consideration, the firm promised and agreed to pay plaintiff's account herein set out in exhibit A, filed with the first paragraph of complaint herein and made a part of the paragraph by indorsement thereon in writing in the following words and figures, to wit: 'I guarantee the payment of this account. George L. Gwinn. 9-9-01;'" that appellant accepted such promise and agreement as security for the payment of the account and relied thereon; that appellees have failed to pay the account, though demanded, and that the same is past due and unpaid; that Orem and Chapman individually and as a firm were on August 26, 1901, by reason of such sale, rendered and became insolvent, and that each and the firm have since been and are now insolvent. Judgment against appellees is asked. A demurrer to the second paragraph was overruled. Appellee Gwinn answered by general denial, and that the guaranty sued on in the second paragraph was given without any consideration. Orem & Chapman were defaulted. Upon a trial the court found in appellant's favor against the appellees for \$25, and over appellant's motion for a new trial rendered judgment for that amount. Overruling the motion for a new trial is the only question argued.

The judgment rendered is in appellant's favor, and the only complaint made in this court is that the amount of recovery is too small. The argument of counsel is

1. directed to the judgment as against Gwinn. A failure to assess a larger amount of recovery may or may not be solely a question of fact. If, in a given case, there is a dispute as to the amount that should be recovered, the appellate court could not disturb a finding on the ground that the amount found to be due was too small; but if the evidence shows without dispute that a certain sum is due, if anything is due, whether the amount found to be due is too small may be a question of law. *Paxson v. Dean* (1903), 31 Ind. App. 46.

If the finding rests upon the first paragraph of complaint, appellant cannot be heard to complain that the amount of recovery is too small, for the reason that

2. this paragraph is based upon the act of March 11, 1901, *supra*, which act has been held unconstitutional. *Sellers v. Hayes* (1904), 163 Ind. 422. See, also, *McKinster v. Sager* (1904), 163 Ind. 671, 68 L. R. A. 273. As the law was invalid, there could be no recovery under it. As the act was unconstitutional, it was absolutely void and was inoperative for any purpose. Appellant was not entitled to a judgment in any amount on the first paragraph.

In *Strong v. Daniel* (1854), 5 Ind. 348, the appellant recovered a judgment upon which one Conover became replevin bail, thereby staying execution 180 days. After

3. the lapse of that period and the issuance of a writ of *feri facias*, an act of the legislature provided that on all judgments which had been replevied under the then existing laws, but not fully satisfied, and on all judgments on which a stay had expired, and execution had been issued, and levied or not levied, the execution debtor might replevy the same, in addition to the former stay, for six months after March 1, 1840. Under this act Daniel entered himself bail for the additional stay of execution. After the expiration of the six months another *feri facias* was issued and levied on Daniel's land. In affirming a decree perpetually enjoining the sale of the land it was held that the act was unconstitutional and that Daniel was not estopped to set up the invalidity of the act under which he acted.

The second paragraph of complaint is based upon a written guaranty of a past-due account of Orem & Chapman. No attempt is made in the pleading to state

4. any cause of action against Gwinn other than on the written guaranty. As the instrument upon which the complaint is founded does not itself purport a consideration, the complaint should aver facts showing a

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consideration. This it fails to do. The pleading does aver the promise was for a valuable consideration, but this is the conclusion of the pleader, and it is the province of the court and not of the pleader to determine whether the consideration was a valuable one or not. The promise made by Gwinn was made fifteen days after the sale by Orem & Chapman to Gwinn, and there is nothing in the pleading to show that this promise and the sale were a part of one and the same transaction. See *Brush v. Raney* (1870), 34 Ind. 416; *Leach v. Rhodes* (1874), 49 Ind. 291; *Nichols v. Nowling* (1882), 82 Ind. 488; *Wheeler v. Hawkins* (1885), 101 Ind. 486; *Plunkett v. Black* (1889), 117 Ind. 14.

As to Gwinn, the second paragraph of complaint did not state a cause of action. As the paragraph is insufficient to authorize a judgment in any amount against

5. Gwinn there is no ground for complaint that the amount of recovery is too small. Appellant cannot be heard to complaint of its own bad complaint, and a failure to render judgment in its favor on this paragraph gives it no right to a new trial.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY ET AL. v. ROACH.

[No. 5,685. Filed June 7, 1906.]

1. **APPEAL AND ERROR.**—*Removal of Causes.*—*Overruling Petition for.*—*Assignment.*—*New Trial.*—The overruling of a petition to remove a cause to the federal court cannot be assigned as error independently on appeal, but must be made a ground for a new trial. p. 213.
2. **PLEADING.**—*Complaint.*—*Inconsistent Averments.*—*Railroads.*—*Negligence.*—An averment that defendant railroad company's train left the track because of rotten and defective ties, which would not hold the spikes, thus causing the rails to spread, and an averment that such train was derailed because of a broken axle, are inconsistent, but such inconsistency does not render such complaint bad. p. 214.

3. PLEADING.—*Complaint.—Railroads.—Car Inspection.—Defective Axle.*—A complaint alleging that it was defendant railroad company's duty to inspect its cars at H.; that it kept a switch-yard at such point and maintained a car inspector there and that it failed to inspect the car causing the injuries, sufficiently shows, though not in terms, that the car causing the injuries passed through such yards. p. 214.
4. CARRIERS.—*Passengers.—Railroads.—"Shipper's Pass."*—A person in charge of live stock, riding on a "shipper's pass" on a freight-train, is a passenger for hire. p. 215.
5. PLEADING.—*Complaint.—Carriers.—Railroads.—Passengers.—Position on Train.*—A complaint by a passenger against his carrier for damages caused by a derailment of the train, is not bad because it fails to state at what place on the train plaintiff was riding when injured. p. 215.
6. APPEAL AND ERROR.—*Complaint.—Initial Attack on Appeal.*—A complaint attacked for the first time on appeal is sufficient if it states facts sufficient to bar another action for the same cause. p. 215.
7. TRIAL.—*General Verdict.—Answers to Interrogatories.—When Controlling.*—The answers to the interrogatories to the jury control the general verdict only when in irreconcilable conflict therewith. p. 216.
8. SAME.—*Negligence.—Contributory.—General Verdict.*—A general verdict for plaintiff in a personal injury case is a finding that defendant was guilty of one or more of the acts of negligence alleged and that plaintiff was free from contributory negligence. p. 216.
9. SAME.—*Answers to Interrogatories.—Carriers.—Negligence.—Contributory.*—Answers by the jury showing that plaintiff was riding in the cupola of a caboose of a freight-train on a "shipper's pass;" that there were seats in the caboose; that the cupola was for trainmen and the seats were for passengers; that the caboose stayed on the track and plaintiff got off before the caboose stopped, do not show contributory negligence. p. 216.

From Dubois Circuit Court; *E. A. Ely*, Judge.

Action by John L. Roach against the Southern Railway Company and another. From a judgment on a verdict for plaintiff for \$2,000, defendants appeal. *Affirmed.*

Alex. P. Humphrey, John D. Wellman and M. W. Fields, for appellants.

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W. E. Cox, R. W. Armstrong and Sol. H. Esarey, for appellee.

WILEY, J.—Appellee recovered a judgment in the court below against appellants for injuries sustained by him on account of their alleged negligence.

The cause was put at issue and tried upon the amended first paragraph of complaint. The appellant Southern Railway Company timely filed its petition and bond to remove the cause to the Circuit Court of the United States for the district of Indiana, on the ground of diverse citizenship and separable controversy, it being a foreign corporation and a citizen of Virginia. This motion was overruled. Joseph Steinhart was made a codefendant, but the jury found in his favor. Neither of the appellants moved for a new trial. The jury, with their general verdict, answered interrogatories submitted to them, and appellants each moved for judgment on such answers, notwithstanding the general verdict. These motions were overruled.

The errors assigned are: (1) Overruling the petition to remove; (2) the complaint does not state facts sufficient to constitute a cause of action; (3) overruling the motion for judgment on the answers to interrogatories.

The error, if any, in overruling the petition to remove the case to the federal court, is not available on appeal, because it was not made a reason for a new trial. It is here

1. made an independent assignment of error, and under the holding in the recent case of *Southern R. Co. v. Sittasen* (1906), 166 Ind. 257, this is not sufficient to present the question.

There are three acts of negligence alleged: (1) Failure to inspect; (2) rotten and defective cross-ties, that would not hold the spikes, by reason of which the rails spread and gave way, throwing the train violently from the track; (3) running a heavy freight-train over such defective track, and at a high and dangerous rate of speed. It is alleged that appellants engaged, for a fixed consideration,

to carry from one point to another on "the line of their railway, plaintiff and one car-load of horses," which horses were the property of Peter Schnell; that appellee was the agent of Schnell, and took passage on the car to take care of and control said horses, and was carrying at the time a "shipper's pass," which was given him in consideration of said hire for carrying the car of horses. Then follow the averments in regard to the rotten ties, defective joints, spreading of the rails, and the derailment of the train. It is then alleged that appellants were negligent in failing to inspect "the car axle on one of the cars that made up said train, and they carelessly suffered and permitted said car to remain in said train, with a defective and broken axle;" that if appellants had examined said car, as it was their duty to do, "at the city of Huntingburg, Indiana, * * * said defendants could and would have discovered said defective and broken axle;" that by reason of said carelessness and negligence on the part of appellants, "said axle broke down, and caused the train to leave the track," etc., by which appellee was injured.

There is an inconsistency in two of the averments of the complaint in this, viz.: It is first alleged that the train left the track by reason of the rotten and defective
2. ties, which would not hold the spikes, thus causing the rails to spread; and second, it is alleged that the breaking of the axle caused the train to leave the track. We cannot, however, hold that this inconsistency makes the complaint bad.

The principal objection urged to the complaint is that it alleges that it was appellants' duty to inspect the car at Huntingburg; that Dienhart, one of the defendants

3. below, was appellants' servant, charged with that duty, and that there is an entire absence of an allegation that the car was ever at Huntingburg. In this regard, the complaint goes only so far as to charge that appellants "did keep and maintain a switch yard in

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the city of Huntingburg, * * * and keep and maintain a car inspector," whose duty it was to inspect all cars and trains that pass in and through said yard. While these allegations do not in terms state that the train or car upon which appellee was riding passed through said yards, yet we cannot say the complaint is bad for that reason. The complaint, in this regard, might have been made more specific, if a motion to that effect had been made.

Another objection is that the complaint shows that appellee took passage on the car containing the stock, and this being true he assumed the risk, and hence can-

4. not recover. This point is not well taken. Under the facts pleaded appellee must be regarded as a passenger for hire. *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335; *Ohio, etc., R. Co. v. Selby* (1874), 47 Ind. 471, 17 Am. Rep. 719; *Ohio, etc., R. Co. v. Nickless* (1880), 71 Ind. 271; *Louisville, etc., R. Co. v. Taylor* (1890), 126 Ind. 126; *Delaware, etc., R. Co. v. Ashley* (1895), 67 Fed. 209, 14 C. C. A. 368; *Waterbury v. New York, etc., R. Co.* (1883), 17 Fed. 671; *New York, etc., R. Co. v. Blumenthal* (1896), 160 Ill. 40, 43 N. E. 809; *Evansville, etc., R. Co. v. Mills* (1906), 37 Ind. App. 598.

It is finally argued that the complaint is bad because it does not show any connection between the accident and the injury, in that it does not show where appellee was

5. at the time of the accident. It is shown that he was riding on the train at the time of the accident, and if appellants desired they could have moved to make the complaint more specific.

The complaint is attacked for the first time in this court. There is no essential averment missing. The complaint is sufficient to bar another action for

6. the same injury. This is sufficient where the attack is made for the first time on appeal. *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Efroymsen v. Smith* (1902), 29 Ind. App. 451; *Cleveland, etc.,*

R. Co. v. Baker (1900), 24 Ind. App. 152; *Bertha v. Sparks* (1898), 19 Ind. App. 431; *City of South Bend v. Turner* (1901), 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200; *Town of Knightstown v. Homer* (1905), 36 Ind. App. 139.

The remaining question for consideration is that presented by the action of the court in overruling the motion for judgment on the answers to interrogatories.

7. If the facts specially found are in irreconcilable conflict with the general verdict they will control, and in such event it is error to overrule such motion.

By the general verdict the jury found and determined all material facts in appellee's favor. Such finding establishes that appellants were guilty of one or more

8. of the acts of negligence charged, and hence such finding was within the issues tendered by the complaint. The verdict also included a finding that appellee was without fault.

It is urged that the answers to interrogatories affirmatively show that appellee was guilty of contributory negligence; that by reason thereof they are in

9. irreconcilable conflict with the general verdict, and hence appellants' motion for judgment should have been sustained. The facts, as exhibited by the answers to interrogatories upon which appellants base this contention, are as follows: Appellee was riding in the cupola of the caboose at the time of the accident. This seat was five or six feet above the floor of the caboose. There were seats in the caboose. The cupola was for trainmen only, and the seats below were the usual and proper place for appellee. The caboose and seven or eight cars in front of it remained on the track, attached together. The doors of the caboose were shut. The appellee got off before the caboose stopped. The track under these cars was in good repair and undisturbed by the wreck. We are unable to see anything in the facts thus disclosed to indicate that

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appellee was guilty of contributory negligence. It is not made to appear that riding in the cupola of the caboose, or getting out of it before the train stopped, had anything to do with his injury. Taking the facts specially found as a whole, they tend strongly to support, rather than to contradict, the general verdict.

Judgment affirmed.

CHICAGO & WESTERN INDIANA RAILROAD COMPANY
ET AL. v. MARSHALL.

[No. 5,441. Filed November 2, 1905. Rehearing denied June 7, 1906.]

1. **JURISDICTION.**—*Action Brought in Wrong County.*—*How Questioned.*—*Waiver.*—Where the jurisdiction over the person, because the action was brought in the wrong county, is not questioned by demurrer or answer, such question is waived under §346 Burns 1901, §343 R. S. 1881. p. 222.
2. **SAME.**—*Joint Defendants.*—*Service.*—*Venue.*—Two or more defendant corporations having offices in this State may be sued in any county where one of them has an office, service on the others in other counties giving the court jurisdiction. p. 222.
3. **SAME.**—*Joint Defendants.*—*How Determined.*—Whether defendants in an action are joint is a question to be determined by the court from the complaint on file when the summons is issued, and if it shows a cause of action against the defendants jointly, the court has jurisdiction over all defendants served, where one is a resident of the county in which the action is brought. p. 222.
4. **PLEADING.**—*Complaint.*—*Joint Negligence.*—*Railroads.*—A complaint showing that injuries were received in consequence of the several acts of negligence of three railroad companies using a single track, properly joins such three companies as defendants, an allegation of preconcerted action being unnecessary. p. 222.
5. **SAME.**—*Complaint.*—*Railroads.*—*Negligence.*—A complaint against three railroad companies alleging that plaintiff was injured by the carelessness of said companies "in the running of their said trains and in their neglect and carelessness in giving and receiving and executing orders for the running of said trains, and in the careless and negligent manner that said

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trains were left standing on the tracks," and by the "neglect of said defendants to observe the targets and danger signals, and in the running of said trains at a high and ungovernable rate of speed," is bad, since such allegations are too indefinite as to the acts constituting negligence. p. 223.

6. PLEADING. — *Complaint.* — *Demurrer.* — *Construction.* — *Intendments.* — *Appeal and Error.* — A complaint, attacked by a demurrer in the trial court, must be construed on appeal with reference to its containing facts sufficient to constitute a cause of action, and without reference to any intendments indulged to cure a defective complaint after verdict, where not attacked by demurrer. p. 225.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Action by Samuel R. Marshall against the Chicago & Western Indiana Railroad Company and others. From a judgment on a verdict for plaintiff for \$2,700, defendants appeal. *Reversed.*

W. O. Johnson, E. C. Field, H. R. Kurrie, J. B. Kenner, C. K. Lucas and Sumner Kenner, for appellants.

R. A. Kaufman and C. W. Watkins, for appellee.

BLACK, J.—The appellee brought his action against the Chicago & Erie Railroad Company and the appellants, the Chicago & Western Indiana Railroad Company and the Chicago, Indianapolis & Louisville Railway Company, to recover damages for personal injury suffered by the appellee while in the employ, as rear brakeman on a freight-train, of the first named company, which we shall designate as the Erie Company. The judgment being in favor of the Erie Company, the appeal is brought by the other two companies, which we shall designate as the Western Company and the Monon Company.

The complaint at first consisted of one paragraph, in which it was in substance shown, after preliminary averments concerning the corporate character and the business of each of the defendants, that August 16, 1902, the Western Company was the owner of a line of railroad from

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Hammond, Indiana, to Chicago, Illinois, with side-tracks and switches, and was operating and controlling a double-track line of railroad between those places; that each of the other companies was running its cars and locomotives over these tracks under a contract of lease, but subject to the orders, directions and rules of the Western Company, and each of the other companies received all its orders and directions for the running of its trains from the Western Company, and was so running its trains of cars and locomotives on the morning of the day above mentioned; that the appellee was in the employ of the Erie Company as brakeman on a freight-train, and it was his duty to obey the orders and signals of the conductor and engineer of said train, who were also in the employ of the Erie Company, which was running a train of cars, on which appellee was engaged as rear brakeman, from Chicago, Illinois, to Huntington, Indiana, over the lines of the Western Company; that, under the orders of the Western Company, they had advanced and were at or near State Line, and had arrived at the target station, and had received the target signal to enter the semaphore, and had pulled the train upon the target switch, and were standing within the distance semaphore awaiting the orders of the Western Company; that, while they were thus standing, the Monon Company's passenger-train, which was being run as a special train over the tracks of the Western Company, from Chicago to Indianapolis, on the same line of tracks over which the Erie Company was running its train, and over and on the track on which the Erie Company's train was so standing, and just as the last-mentioned train had started to leave the distance semaphore, approached the signal station with its train, at a rapid rate of speed, and ran into the rear end of the Erie Company's train, and over the appellee while he was in its caboose; that the appellee was buried under the wreckage, and crushed, bruised, mangled

and permanently disabled, his injuries being described; that when he was struck by the locomotive engine of the Monon Company, he had just entered the caboose of the train on which he was so employed, which had just started to leave the track in the distance semaphore, and he had no knowledge that any train was being run on said tracks; that the train which ran into and over him was an extra train, and was not on any regular time-card, and had no regular time limit known to the appellee, and he had no notice or knowledge of the running of said train, or that another train or extra passenger-train was being run on said tracks; that he received no orders or directions from any one with reference to any extra train; that the conductor in charge of the Erie Company's train had no notice or knowledge or orders with reference to the running of this extra train, at the time he reached the signal station on which the appellee was struck, and only received such notice when his train was starting to leave that point, and no notice was ever given the appellee. There were further averments relating to the damages sustained by the appellee. It was alleged that the Western Company "carelessly and negligently omitted to give the plaintiff any orders as to the running of said extra passenger-train;" that the Monon Company "carelessly and negligently ran said train at a high rate of speed when approaching said signal station, and carelessly and negligently ran its said train over and against this plaintiff, without having any orders or directions or signal to cross over the tracks at the signal-station, and without having any signal giving that company the right to run on said semaphore, or distance switch, but carelessly and negligently ran its said locomotive and cars against the plaintiff and against the car in which this plaintiff was at that time, without having received any signal so to run its said cars and locomotive, and with the signal at said station turned against the running of its said

train;" that the Erie Company "so negligently ran its train of cars, and permitted the same to be and remain on said tracks at the time when said passenger-train was approaching, and carelessly and negligently managed the running of its said train as to permit it to remain on said tracks, in front of said approaching train, after the engineer and conductor in charge of said train had been notified of the approach of said passenger-train, for the period of about two minutes, without in any manner notifying this plaintiff of the approach of said train; that by reason of such negligence on the part of the defendants herein, and the carelessness in the running of said trains, and the neglect to execute and deliver the proper orders for the running of said trains, the plaintiff herein received the injuries stated," etc.

The appellants, appearing specially, separately and severally, "for the purpose of contesting the sufficiency of the summons and service and return thereon only," filed a verified motion to quash the summons and return thereof, alleging that the action was brought against their railroad corporations; that these defendants had no connection with each other, except such as one company has with another in usual traffic and business connections; that the action was not on contract, but was in tort; that the appellants or neither of them ran through Huntington county, and had no office or agents in that county; that the only summons or service upon the Monon Company was a return of service on an agent of that company at Hammond, Indiana; that the only service of summons on the Western Company was service on a railroad telegraph operator at the same place; that a summons and return upon the appellants did not give jurisdiction over the parties and subject-matter in the court below. The appellee, treating this motion as a plea to the jurisdiction of the court, demurred to it, and the demurrer was sustained.

The objection which it was thus sought to raise did not relate to the form of the summons or the manner of service shown by the return, but was an objection that as

1. to each of the appellants the action against it was brought in the wrong county. Such objection, if not taken by answer or demurrer, is to be deemed as waived. §346 Burns 1901, §343 R. S. 1881; *Eel River R. Co. v. State, ex rel.* (1896), 143 Ind. 231; *Globe Accident Ins. Co. v. Reid* (1898), 19 Ind. App. 203, 218. No objection was made in the plea to the bringing of the action

2. in Huntington county against the Erie Company.

The action against that company being properly brought in that county, process might properly be sent for service on the appellants in another county, if the appellants were properly joined with the Erie Company as defendants; that is, if the complaint showed facts which not only rendered the appellants liable to the appellee

3. for his injury, but which also rendered the Erie Company likewise liable, and which authorized the joining of the appellants as defendants with the Erie Company. The action of the court in sustaining the demurrer to the plea is to be considered with reference to the complaint on file when the court made its ruling upon the demurrer to the plea, without reference to subsequent developments in the cause.

The complaint then on file, the substance of which we have set forth, showed a cause of action at common law against all of the defendants, for a single injury

4. inflicted at one time by the collision of the engine of the Monon Company with the train of the Erie Company; and while it was not shown that any particular alleged negligent act or omission was the act or omission of all the defendants jointly, it was shown that the defendants were all using the same railroad track and operating under common rules, and that negligent conduct of all at the same time and place combined and concurred in

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causing the single injury. They were acting in concert in the use of the track, and, though they did not conduct themselves negligently by preconcert, yet it was by their united negligent acts and omissions that the appellee was injured. In such case he might sue one or all for the resulting injury. *Shearman & Redfield, Negligence* (5th ed.), §122; *Colegrove v. New York, etc., R. Co.* (1859), 20 N. Y. 492, 75 Am. Dec. 418.

After the ruling upon this plea, the appellee filed a second paragraph of complaint. The appellants demurred to each paragraph of the complaint for want of sufficient facts, and the demurrer was overruled.

In the second paragraph, after allegations relating to the corporate character and the business of the defendants, and stating where the lines of railway of the defendants respectively ran, and showing that the defendants were jointly using the lines of the Western Company, it was further alleged that on August 16, 1902, the appellee was in the employ of the Erie Company as brakeman on one of its trains of cars which was being run from Chicago over the lines of the Western Company; that he was performing the duties of brakeman on that train, and was acting under the orders of the Western Company, from which all orders for the running of trains from Chicago to Hammond were received; that said train had proceeded on its way from Chicago, and had reached a point on the line of the Western Company near State Line, a signal-station on that railway line, and had received the target signal, and had run the train within the semaphore, and the train had stopped to receive orders for the purpose of continuing forward to its destination; that on that day the Monon Company was running one of its trains from Chicago over the same line and under orders from the same company as the Erie Company; that both of these trains were being run in the same direction and on the same line of track; that while they were being so run

and operated, and while the appellee was engaged in the line of his duty as brakeman on the train of the Erie Company, the train of the Monon Company run into and over and on the cars of the Erie Company, and into and over the car on which the appellee was, and crushed, maimed, and bruised him, etc., stating his various injuries. Next in this paragraph were the only charges of negligence in any acts or omissions, in the closing portion of the pleading, as follows: "That his said injury was caused by the carelessness of said railroad companies, these defendants, in the running of their said trains, and in their neglect and carelessness in giving, receiving and executing orders for the running of said trains, and in the careless and negligent manner that said trains were run and left standing on the tracks of said defendants' railroad, and the neglect of said defendants to observe the targets and danger signals, and in the running of said trains at a high and ungovernable rate of speed when approaching said target and station-signal, and not having their said trains under control when approaching said target and signal-station, to the injury of this plaintiff in the sum of," etc. In this closing portion of the pleading each and all of the acts and omissions there characterized as negligent are attributed to all the defendants, without discrimination. No act or omission is here directly alleged or charged against any one or all of the defendants, and the general and indefinite averments attributing negligence do not even refer by way of recital to any other averments making such necessary, direct charges.

The railroad companies were authorized by their corporate franchises to run trains, and they could not therefore be negligent merely "in the running of their trains." It is nowhere alleged that they, or either of them, negligently did or omitted anything relating to the running of trains, or negligently ran a train upon the appellee, or upon the car in which he was when injured. It is not stated what

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orders were given or received or executed, nor that any orders were negligently given or negligently received or negligently executed, nor does it appear in what respect there was negligence in the giving or the receiving or the executing of any orders. It is not made to appear in what respect the trains were negligently "run and left standing," nor is it alleged that any train or trains were negligently run and negligently left standing. It is said, in the former portion of the pleading that the Erie Company had received the target signal, and had run the train, on which the appellee was acting as brakeman, within the semaphore, and that the train had stopped to receive orders. No negligence is in this connection attributed to any of the defendants, and in the closing portion quoted no reference is made to the running or stopping before mentioned in the pleading, so as to identify what was before alleged with the running and leaving standing mentioned as having been done in a negligent and careless manner. It is nowhere in the complaint directly alleged that the defendants, or either of them, neglected or even failed to observe the targets and signals, nor is there any statement as to what targets and danger signals there were which might have been observed, but were not. It is not directly alleged in the pleading that the defendants, or any of them, ran "said trains," or any train, at a high and ungovernable rate of speed, or did not have "said trains," or any particular train, under control.

When a complaint is seasonably attacked by demurrer for want of sufficient facts, and the demurrer is overruled,

the pleading must be construed in this Court with

6. reference to the legislative requirement that it shall contain a statement of the facts constituting the cause of action; and we cannot indulge those intendments which are allowed after verdict to cure a defective complaint. The demurring party has a right to a correct ruling by the trial court, and the deprivation of such right may be

remedied on appeal. It cannot be held that the second paragraph comes within the requirements heretofore enforced in such cases. See *Pittsburgh, etc., R. Co. v. Conn* (1885), 104 Ind. 64; *Corporation of Bluffton v. Mathews* (1883), 92 Ind. 213; *Harris v. Board, etc.* (1889), 121 Ind. 299; *Baltimore, etc., R. Co. v. Young* (1896), 146 Ind. 374; *Ohio, etc., R. Co. v. Engler* (1892), 4 Ind. App. 261; *Lake Erie, etc., R. Co. v. Mikesell* (1899), 23 Ind. App. 395; *South Chicago City R. Co. v. Moltrum* (1901), 26 Ind. App. 550; *Toledo, etc., R. Co. v. Beery* (1903), 31 Ind. App. 556; *City of Hammond v. Winslow* (1904), 33 Ind. App. 92.

Judgment against the appellants reversed, and cause remanded, with instruction to sustain the demurrer of the appellants to the second paragraph of the complaint.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY v. PORTER ET AL.

[No. 5,069. Filed May 9, 1905. Rehearing denied November 15, 1905. Transfer denied June 7, 1906.]

1. TRIAL.—*Record.*—*Amendments.*—*Entries.*—*Nunc Pro Tunc.*—*Evidence.*—An exhibit to a complaint, unattached thereto, which is filed therewith and properly identified in such complaint may be shown, by a *nunc pro tunc* entry, to have been so filed therewith, the clerk's file mark and parol testimony substantiating such claim and no denial being made. p. 228.
2. PLEADING. — *Complaint.*—*Exhibits.*—*How Made.*—*Order-Book Entries.*—An exhibit to a complaint which is not physically attached thereto is a part thereof, where the complaint makes it a part thereof by reference; and a separate order-book entry of the filing thereof is not necessary. p. 228.
3. MUNICIPAL CORPORATIONS.—*Street Improvement Liens.*—*Subsequent Foreclosure on Back-Lying Lots.*—The holder of a lien for street improvements, having foreclosed same as against the lots fronting the street, may subsequently foreclose such lien against the back-lying lots. *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, followed. p. 228.

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4. MUNICIPAL CORPORATIONS.—*Street Improvement Liens.*—*Subsequent Foreclosure on Back-Lying Lots.*—*Attorneys' Fees.*—In a suit to foreclose the lien for street improvements against back-lying lots, such lien having been foreclosed against the lots fronting the street, attorneys' fees may be recovered, though attorneys' fees were recovered in the former foreclosure. *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, followed. p. 228.

From Marion Circuit Court (10,583); *Henry Clay Allen*, Judge.

Suit by Robert L. Porter and others against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and another. From a decree for plaintiffs, defendant railway company appeals. *Affirmed.* (Appealed to Supreme Court of the United States.)

L. J. Hackney, Elliott, Elliott & Littleton and *John T. Dye*, for appellant.

Gifford & Gifford, for appellees.

ROBY, J.—It appears from the complaint that the appellant is the owner of back-lying real estate within 150 feet of a street, in the city of Lebanon, improved in 1896 under the Barrett law, the purpose of the suit being to foreclose the lien of the assessment upon said back-lying real estate, the front portion thereof owned by other parties having sold for an amount less than such assessment.

A demurrer for want of facts to each of the two paragraphs of complaint was overruled. An answer of several paragraphs was filed, including a general denial, special findings of fact and conclusions of law were made and stated by the court, and a decree of foreclosure rendered in accordance therewith, from which this appeal is taken.

Since the cause was tried and since the appeal was perfected the case of *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599—the facts of which are very similar—has been decided, the conclusions announced therein rendering it unnecessary to do more at this time with regard to many of appellant's contentions than to cite the foregoing case.

It was asserted in appellant's original brief that the complaint was bad in failing to exhibit a copy of the assessment roll. Return to a writ of *certiorari* shows the

1. exhibit to have been filed with the amended complaint, a *nunc pro tunc* entry having been made to that effect by the trial court. Appellant contends that inasmuch as the evidence upon which such entry was made shows that the exhibit was not attached to the pleading, and that no separate entry of the filing of said exhibit with the pleading was made, there was no basis upon which the *nunc pro tunc* entry could be made. The exhibit is identified by the file mark of the clerk of the Boone Circuit Court and by parol evidence, and there is no evidence to the contrary. *Security Co. v. Arbuckle* (1890), 123 Ind. 518.

While the exhibit was not bodily attached to the pleading it was referred to therein as follows: "A copy of which corrected and amended estimate report is filed

2. herewith, made a part hereof, and marked exhibit A." The exhibit thus marked and filed with the complaint became a part thereof without a separate order-book entry.

It is also asserted that an election to foreclose the assessment lien upon the property fronting upon the improved street estopped the appellees from a subsequent

3. foreclosure upon back-lying property. The proposition seems to be otherwise held. *Voris v. Pittsburgh Plate Glass Co.*, *supra*.

Judgment affirmed.

ON PETITION FOR REHEARING.

WILEY, C. J.—In appellant's brief in support of its petition for a rehearing four propositions are presented and discussed: (1) That appellees' having fore-

4. closed the lien upon the abutting property cannot now maintain another suit to foreclose the same

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lien upon the back-lying property. (2) If there was no assessment against the back-lying property there can be no foreclosure, and if there was an assessment it was indivisible, and appellees cannot make it divisible and split their demands. (3) That it was error to allow attorney's fees as they were not claimed in the complaint, nor could more than one attorney's fees be recovered. (4) That there was not due process of law, and appellant was denied an equal protection of the law. It would seem that the first, second and fourth propositions just stated have been adjudicated adversely to appellant's contention by the decision in the case of *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599, upon which the original opinion of affirmance was based. The Appellate Court is bound by the law as declared by the Supreme Court, and hence that case rules the one here as to all similar questions involved and decided. Speaking for myself, I am not in full accord with the rule there declared, that when an assessment is made against abutting property for a street improvement, where such property does not extend back from the street line 150 feet, the lien of the assessment attaches to the back-lying property within the taxing district, even where no assessment has been made against such back-lying property and the name of its owner has not been placed upon the assessment roll. Neither am I in accord with the doctrine that the holder of the lien can first proceed against the abutting property, and upon failure to realize upon sale a sufficient sum to discharge the lien, costs, etc., he may subsequently proceed against the next adjacent back-lying property, and so on till all the property within the taxing district is exhausted. This would permit the lien holder to split up his demand and bring as many suits as there are property owners within the taxing district. There might be one, two, three or more of such property owners, and this would be manifestly unjust and inequitable, and necessarily lead to a multiplicity of suits. This is against

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the policy of the law. The statute (§4290 Burns 1901, Acts 1889, p. 237, §3) declares that such a lien shall be foreclosed "as a mortgage is foreclosed," and that the lien holder shall recover the amount of the bond or certificate, interest and cost, and "a reasonable attorney's fee." By §4297 Burns 1901, Acts 1889, p. 237, §9, it is provided that in such foreclosure any number of "owners of property on which the same [certificates or bonds] are a lien, may be joined as defendants in such suit." Being true, as held in the case of *Voris v. Pittsburg Plate Glass Co.*, *supra*, that while the abutting property is primarily liable, the lien of the assessment attaches to all the back-lying property within the taxing district, whether the assessment or the name or names of the back-lying owner or owners appear upon the assessment roll, it necessarily follows that in a suit to foreclose the lien all the back-lying owners, under the statute, are proper defendants, and should be made such, to the end that litigation might be reduced to a minimum, and property owners might not be unnecessarily embarrassed by a multiplicity of suits and burdened by an accumulation of unnecessary costs and attorney's fees. While it is not probable, it is highly possible in such case that a half dozen property owners might own lands adjacent and within the taxing district and, if so, there may be six separate foreclosure suits. If six such suits, then six separate and distinct attorney's fees may be included and collected, and costs taxed and collected six times. To illustrate the point I have in mind: Suppose an assessment is made against abutting land for a street improvement in the sum of \$500; suppose there are six separate tracts of land adjacent thereto and to each other within the taxing district owned by different persons. The lien holder first brings his suit to foreclose his lien on the abutting property. He is entitled to judgment for the amount of the assessment, the interest thereon, attorney's fees and costs. The property is sold under the decree and

purchased for \$12, as one tract of land was in this case. His judgment remains unsatisfied. He then brings a second suit to foreclose the lien against the second tract, and he would be entitled to recover the amount of his former judgment, which included principal, interest, costs and attorney's fees, with interest thereon from the time of the rendition of the first judgment, and an additional sum for his attorney's fees and costs. The second tract of land would be advertised and sold and bid in for any amount—say \$50. Still his lien is unsatisfied. Up to this time he has not realized enough from the sale of property to pay the costs and attorney's fees. He would then foreclose as against the third tract, and so on and in like manner until he should foreclose against all six tracts, including in each successive judgment the amount of the previous judgment or judgments and attorney's fees and costs. At the end he would have received and collected attorney's fees six times for the foreclosure of one assessment lien, and would have taxed to his credit the costs of each proceeding. This would invite and encourage litigation. The statute does not contemplate that this should be done, but, on the contrary, provides that any number of property owners shall be made parties. A reasonable construction of the expression "any number of property owners" would be that it includes all such owners against whose property the lien attaches. It would seem that in making such provision the legislature had in mind the possible condition referred to. Courts should not countenance such an unfair and inequitable proceeding, and I feel justified in registering my disapproval of it. This is emphasized by the fact that the respective rights of the lien holder and the abutting and back-lying property owners may all be adjudicated in one foreclosure. When this is done all the lands within the taxing district could be foreclosed against, advertised together for sale, and the abutting tract first sold; and, if it did not sell for enough to discharge the lien, the next

tract could be offered, and so on until all were sold, if necessary.

When equity affords relief against a multiplicity of actions, it would be a violent presumption to say that the legislature, by statute, intended to provide a remedy that would encourage litigation and multiplicity of suits; that would enable a litigious party to recover costs and attorney's fees over and over again, at his own election, in any number of actions, when the whole matter and every right he had could be determined in one suit. This would abrogate a rule, both of law and equity, as old as civil jurisprudence.

The record here shows that in the foreclosure proceedings against the abutting property, there was included as a part of the judgment an attorney's fee equal to about ten per cent of the amount of principal and interest then due. Also in this proceeding a like amount for attorney's fees was included in the judgment. It thus affirmatively appears that for the enforcement of a single assessment two attorney's fees, aggregating ten per cent of the amount of each judgment, have been included in the judgments, and which the property owners are required to pay.

Appellant in this action sought relief from this additional and unwarranted burden by moving to modify the judgment by deducting therefrom attorney's fees. This motion was overruled. It is insisted that the judgment should not include attorney's fees for two reasons: (1) That they are not asked or demanded in the complaint, and (2) because to do so would be to require appellant to pay two attorneys' fees in one suit. There is merit in this contention, for the record shows that the basis of this judgment is the amount of the judgment of the first foreclosure, including interest and cost, and which judgment included, also, a specific amount for appellees' attorney's fees. I cannot in good conscience assent to what seems to me to be so unjust and inequitable a rule. If such a rule

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can obtain, then a lien holder in a street assessment case, who is possessed of a sinister motive and a speculative desire, could split up his demand to correspond to the number of property owners within the taxing district, bring his several suits accordingly, and in each succeeding case increase his demand by an additional attorney's fee and costs, and thus speculate at the expense of the defenseless property owner.

I have taken occasion to examine the record in the case of *Voris v. Pittsburg Plate Glass Co.*, *supra*, and I find that the appellant there had first foreclosed his lien against two abutting lots, had them sold under the decree and bought them in himself for just enough to pay and satisfy the costs. In his subsequent proceeding against the plate glass company he made no demand for attorney's fees, and hence the question of his right to recover a second attorney's fee was neither involved nor decided in that case. It is therefore not authority upon the question I have had under consideration. It may be the law that such lien holder can maintain successive actions to foreclose the same lien, and in each successive action claim and recover successive attorney's fees, but if it is the law it is an unjust and inequitable one, and I feel that I am justified in expressing my disapproval of it. As the case of *Voris v. Pittsburg Plate Glass Co.*, *supra*, however, rules this case as to all questions there involved and decided, and I am bound by that decision, I reluctantly concur in overruling the petition for a rehearing. But if I had the power to declare the law, I would unhesitatingly hold that under the facts disclosed by this record the appellees are not entitled to recover in the second foreclosure proceeding additional attorney's fees.

ROBY, J.—It is held in the case of *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599, that successive suits may be brought. This being so, the right to recover

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costs and attorney's fees, incidents thereto, is not open to denial.

COMSTOCK, J.—The original opinion being based upon *Voris v. Pittsburg Plate Glass Co.* (1904), 163 Ind. 599, I concur in the conclusion that the petition for a rehearing should be overruled.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY v. SOUTHERN INDIANA RAILWAY COMPANY.

[No. 4,615. Filed April 6, 1904. Rehearing denied June 24, 1904.
Transfer denied June 7, 1906.]

1. **MONOPOLIES.—Validity.**—The policy of the law is to prevent the creation of monopolies and to foster fair competition. p. 238.
2. **CONTRACTS.—Monopolies.—Public-Service Corporations.**—A contract between public-service corporations, creating a monopoly, is void. p. 238.
3. **SAME.—Monopolies.—Validity.—Burden of Showing.—Prima facie** a monopolistic contract is invalid, the burden of showing it to be valid being upon the party claiming thereunder. p. 239.
4. **SAME.—Railroads.—Depots.—Sidings.—Switches.—Freight.**—While a railroad company has the right to purchase lands for a right of way, location of depots and sidings, and is bound to carry freight offered at such depots and stopping places, such company cannot legally contract not to establish a depot, siding or switch at a particular place. p. 239.
5. **SAME.—Ultra Vires.—Illegal.—Retention of Benefits.—Estoppel.**—The doctrine that a public-service corporation cannot retain the benefits of an *ultra vires* contract and deny the validity thereof does not apply to contracts forbidden by statute or those contrary to public policy. p. 240.
6. **SAME.—Indivisible.—Partly Invalid.**—Indivisible contracts, partly illegal, and divisible promises, partly illegal, made for indivisible considerations, are wholly void. p. 241.
7. **SAME.—Invalid.—Executory.—Executed.—Relief.**—The court will not interfere at the suit of either party to an invalid executory contract, but will leave the parties to a partly or wholly executed contract where they have placed themselves. p. 242.

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8. **CONTRACTS.—Indivisible.—Suit to Enforce Legal Part.**—A suit cannot be maintained to enforce the legal provisions of an invalid, indivisible contract. p. 243.
9. **SAME.—Invalid.—Enforcement of Valid Part.**—The court will not enforce the valid provisions of an invalid, indivisible contract and wait for the decision upon the invalid parts thereof until plaintiff affirmatively asks relief on such provisions. p. 244.
10. **SAME.—Consideration.—When May Be Contradicted.**—The consideration of a contract cannot be varied by parol when it is made contractual. p. 245.
11. **SAME.—Construction.—Intention.**—Where the intention of the parties to a contract is clear from the language, it prevails and construction is unnecessary. p. 246.
12. **SAME.—Monopolies.—Railroads.**—A contract by which one railroad company restricts its right to compete with another, in consideration of its being permitted to lay its tracks across the tracks of such other, is void. p. 246.

From Lawrence Circuit Court; *W. H. Martin*, Judge.

Suit by the Chicago, Indianapolis & Louisville Railway Company against the Southern Indiana Railway Company. From a decree for defendant, plaintiff appeals. *Affirmed.*

E. C. Field and *H. R. Kurrie*, for appellant.

F. M. Trissal and *Brooks & Brooks*, for appellee.

ROBY, J.—Demurrers were sustained to each of the three paragraphs of appellant's complaint, and the correctness of such action is the question for decision.

A written contract, executed by the Louisville, New Albany & Chicago Railway Company, as the party of the first part, and by the Evansville & Richmond Railway Company, as party of the second part, is filed with each paragraph and forms the basis for the relief prayed, which in the first and second paragraphs is specific performance of the contract, and in the third, judgment for the reasonable cost of constructing the interlocking switch specified therein. The averments are made that appellant succeeded to the rights of the Louisville, New Albany & Chicago Railway Company, and that appellee holds the title of the

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Evansville & Richmond Railway Company, and that the one has the right to enforce, and the other is bound by, the contract in question. This is not controverted, so that the rights of the parties will not be different from what they would be had the agreement between them been originally, and the terms "first party" and "second party," when used in this opinion, will be used as applicable to appellant and appellee respectively.

The contract made on July 29, 1889, in terms grants to the second party the right to construct and operate its railroad over and across the main track and switches owned by the first party, at a designated distance north of the Bedford telegraph office, upon certain specified conditions, which the second party bound itself to perform. The substance of these conditions was that the second party should furnish all material and perform all labor necessary to raise a certain switch track belonging to the first party, to furnish all material and perform all labor incident to the construction and maintenance of the crossing, including an interlocking switch and signal system. In event that the first party should thereafter wish to construct additional tracks, it agreed to adopt its own tracks thereto and pay one-half of the expense of whatever else (frogs, signals, etc.) might be necessary to make the crossing safe. It was further stipulated that proper appliances were to be used in such improvement, and that employes performing service at said crossing should be subject to removal at the demand of the first party. The second party bound itself to hold the first party harmless from cost and damage resulting from the construction or the use of said crossing. The concluding clauses of the contract were of the tenor following:

"Sixth. The second party agrees not to run any track or tracks to or from any stone-quarry which is connected with the road of the first party, by switches or tracks built thereto by said first party or under contract therefor, and will not make any demands for

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the use of said first party's tracks or switches leading to any such quarries, for the shipment of stone therefrom, the express purpose of this clause being to preserve to said first party all rights and benefits now acquired in the business of such quarries; and it is hereby expressly understood and agreed that the consideration for granting the rights and privileges herein expressed to said second party is the covenant and agreement of said second party not in any manner, directly or indirectly, to interfere with or divert the benefits now derived or to be hereafter derived from said first party's connection and business with such quarries.

Seventh. In consideration of making a Y connection, it is agreed between the parties hereto that in case any party or parties require said first party to forward stone or other car-load freight to the line of the second company, it is agreed that the proportion of the through rate from any given quarry or station accruing to the party of the first part shall not be less than three cents per hundred pounds."

By clause sixth the second party agreed not to run any track into any stone-quarry connected by switches or tracks with the road of the first party, and not to demand the use of such tracks for the shipment of stone; "the express purpose of this clause being to preserve to said first party all rights and benefits now acquired in the business of such quarries." The concluding portion of the clause contains a further agreement by the second party not "directly or indirectly to interfere with or divert the benefits now derived or to be hereafter derived from said first party's connection and business with such quarries." This clause clearly states the purpose for which it is drawn. Its effect, and its intended effect, is to deprive a class of citizens, engaged in a certain business, of advantages that might accrue to them from the facilities afforded them for the shipment of their merchandise over a competing railroad.

By this agreement the two railroad companies undertook to contract away the rights of third parties, without their

knowledge, and in defiance of the public duty devolved upon such companies. That the contracting parties were conscious of the quality of such undertaking is indicated by the seventh clause of the contract, where, in case "any party or parties require said first party to forward stone * * * to the line of the second party," then irrespective of distance, at least three cents per hundred pounds must be paid first party for its share of the through rate; a stipulation, the effect of which is to deprive the shipper of the benefits of competition, should he demand that the second party discharge its public duty by furnishing transportation facilities to him. The policy of the law is to prevent the creation of monopolies and to foster fair competition. *Eel River R. Co. v. State, ex rel.* (1900), 155 Ind. 433; *Indianapolis Union R. Co. v. Dohn* (1899), 153 Ind. 10, 45 L. R. A. 427, 74 Am. St. 274; *State, ex rel., v. Portland Nat. Gas Co.* (1899), 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. 314; *Board, etc., v. LaFayette, etc., R. Co.* (1875), 50 Ind. 85; 2 Elliott, Railroads, §359.

"A contract between corporations charged with a public duty, such as that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is here no antidote which will rescue it from legal death." *Cleveland, etc., R. Co. v. Closser* (1890), 126 Ind. 348, 361, 9 L. R. A. 754, 22 Am. St. 593. The important thing to be secured was, the court declared in the case above cited, a sound and salutary general principle, and not merely cases with closely resembling facts. The principle declared, as heretofore quoted, accords with the necessities of commerce and development, and is supported by a vast volume of authority, including the following: *Louisville, etc., R. Co. v. Sumner* (1886),

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106 Ind. 55, 59, 55 Am. Rep. 719; *St. Louis, etc., R. Co. v. Mathers* (1874), 71 Ill. 592, 22 Am. Rep. 122; Greenhood, Public Policy, p. 626; *Kettle River R. Co. v. Eastern R. Co.* (1889), 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *West Va. Trans. Co. v. Ohio River, etc., Co.* (1883), 22 W. Va. 600, 626, 46 Am. Rep. 527.

It is contended in argument that it was competent to make the contract in question, in order to prevent destructive competition. There is no basis of fact

3. justifying the proposition. A combination between common carries to prevent competition is *prima facie* illegal. "The burden is on the carrier to remove the presumption, and until it is removed the agreement goes down before the presumption, and the agreement must be held to be within the condemnation directed against all contracts which violate public policy." *Cleveland, etc., R. v. Closser, supra*, at page 360. And see *State, ex rel., v. Portland Nat. Gas Co., supra*.

The appellee railroad company has power, by the provisions of the statute, to purchase, receive and take such lands as may be necessary to the construction and

4. maintenance of its railroad, stations, depots and other accommodations necessary to accomplish the objects for which the corporation was created. §5153 Burns 1901, §3903 R. S. 1881. The statute also makes it the duty of railroad corporations to furnish sufficient accommodations for the transportation of all such persons and property as shall, within a reasonable time previously thereto, offer or be offered for transportation at the place of starting, at the junctions of other railroads and at sidings and stopping places established for receiving way passengers and freight. §5185 Burns 1901, §3925 R. S. 1881. It has frequently been adjudged that contracts of a railroad company, by which it undertakes not to locate stations or depots within prescribed limits, are contrary to public policy and void. *Louisville, etc., R. Co. v. Summer,*

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supra; *St. Joseph, etc., R. Co. v. Ryan* (1873), 11 Kan. 602, 15 Am. Rep. 357; *Florida, etc., R. Co. v. State, ex rel.* (1893), 31 Fla. 482, 13 South. 103, 34 Am. St. 30, 20 L. R. A. 419; *Elkhart County Lodge v. Crary* (1884), 98 Ind. 238, 49 Am. Rep. 746. The analogy between an agreement not to furnish facilities for transportation by the location of depots, and an agreement not to furnish facilities for transportation by the location of certain side-tracks, is exact.

No question of the exercise of the right of eminent domain is involved in this appeal. It is not even shown that it would be necessary to condemn or purchase any land in order to reach the stone-quarries that are presumably within reach of appellee's railroad. So far as facts are shown, its right of way may abut upon any number of quarries, in the output of which not only the owners but the purchasing public are interested, both as to price and delivery. If sidings were in existence connecting appellee's railroad with such quarries, it would be bound to receive and transport freight there offered to it. To disable itself, by contract with a competing carrier, from constructing such siding, is something it cannot be allowed to do. The siding is as essential to the proprietor of the stone-quarry, in the transportation of his commodity, as the station or depot is to him who wishes to take passage himself or to ship lighter merchandise. The agreement made by the second party to this contract, as specified in clause six, is within the reason of the law and the authorities. It is therefore illegal.

Appellant, however, contends that, even if the contract be declared *ultra vires*, the second party to it, having acquired the right to cross its tracks, and having

5. crossed them, will be required to make compensation upon the established principle that a corporation may not retain the benefit received under an *ultra vires* contract and at the same time set up its own want of power

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to contract. The difficulty with the application of this doctrine is that the undertaking is not *ultra vires* in the strict sense, but it is illegal and absolutely void. "The doctrine does not apply to contracts where the same are forbidden by statute or are contrary to public policy." *Franklin Nat. Bank v. Whitehead* (1898), 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. 302.

"If a promise to do several acts is indivisible, and is in part illegal, it cannot be enforced as to that part which is legal, but the whole agreement is void. * * *

6. Where the agreement consists of one promise made upon several considerations, some of which are bad and some good, here, also, the promise is wholly void, for it is impossible to say whether the legal or the illegal portion of the consideration most affected the mind of the promisor, and induced his promise." Clark, Contracts, p. 472.

Where an action was brought upon a note, part of the consideration of which was an agreement that the makers should have the exclusive right to carry policies of marriage benefit insurance upon the payee and his intended, the contract was held to be entire and unenforceable. *James v. Jellison* (1884), 94 Ind. 292, 48 Am. Rep. 151. The authorities sustaining the propositions stated are too numerous to require citation. The doctrine is as thoroughly settled and its principle is as wholesome as any known to the law. *Higham v. Harris* (1886), 108 Ind. 246; *Ricketts v. Harvey* (1886), 106 Ind. 564; *Rainbolt v. East* (1877), 56 Ind. 538; *Douthart v. Congdon* (1902), 197 Ill. 349, 64 N. E. 348; Bishop, Contracts (2d ed.), §487.

In *Hunter v. Pfeiffer* (1886), 108 Ind. 197, an agreement was made by a number of parties to enter into a partnership in the construction of a public work. The plaintiff based his right to recover upon a breach of such contract of partnership. The action was apparently in-

offensive, but facts were stated in the pleadings from which the court inferred that one of the reasons for making the partnership contract was a desire to prevent competition in bidding upon the public work. Recovery was refused. The opinion, written by Judge Mitchell, is most direct. It is said therein: "The whole purpose of the statute is to encourage open, fair competition between responsible bidders, and any secret combination, call it partnership or anything else, the effect of which is to abate honest rivalry or prevent fair competition, is to be condemned as violative of public policy, and void. No one can predicate an enforceable right upon such an agreement."

The appellant is seeking to enforce a contract illegal in itself. The law will refuse to lend its aid to that end.

Executory, it will interfere at the suit of neither

7. party; executed in whole or in part, it leaves the parties where they have placed themselves. *Terre Haute Brewing Co. v. Hartman* (1898), 19 Ind. App. 596; *Woodford v. Hamilton* (1894), 139 Ind. 481; *Hutchins v. Weldin* (1888), 114 Ind. 80; *Schmueckle v. Waters* (1890), 125 Ind. 265.

It makes no difference that the whole consideration was not in itself illegal. In *Kain v. Bare* (1892), 4 Ind. App. 440, the note in suit had been given for Bohemian oats, and the contract calling for the sale of other oats was held to be a gambling contract, and therefore illegal as against public policy. This court then said: "The fact that the answer concedes the oats to have been of some value is used as an argument by appellant's counsel in favor of the position that the consideration not being wholly illegal, the answer is but a partial response to the complaint when it attempts to meet all, and is therefore bad. If the answer sought to avoid the contract on account of fraud, the appellant's position would be sound, as this court has decided. *Regensburg v. Notestine* [1891], 2 Ind. App. 97. But where the entire contract is illegal and void, from public

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policy, the courts will not lend themselves to the enforcement of any part of it. *Schmueckle v. Waters* [1890], 125 Ind. 265."

If the action were brought by the appellee under the contract to enforce its right to the crossing, questions involved would be presented exactly as in an action on a promissory note given in consideration of two agreements, one legal and one illegal, as in *James v. Jellison, supra*. No one could then say that the consideration for the contract, enforcement of which is asked, was not tainted, and no one could tell what part of the engagement depended upon the illegal part thereof.

In *Edwards County v. Jennings* (1896), 89 Tex. 618, 35 S. W. 1053, the commissioners of a county granted an exclusive right to lay pipe, etc., in the streets of a town, and agreed to pay \$3,500 in consideration of the erection of a water-works system in said town. The grant of an exclusive franchise was, under the laws of the state, illegal. The court refused to separate the parts of the consideration, saying that it was impossible to determine how much of the contractor's obligation was based upon the illegal part of the consideration.

Does the fact that the crossing has been made, and that the action is to recover that part of the consideration, not in itself illegal, render the contract divisible and

8. enforceable? The answer, upon principle, is that neither divisibility nor illegality depends upon the form of the action, or which party happens to be plaintiff. The question, however, is settled by the authorities.

In *Indiana, etc., R. Co. v. Koons* (1886), 105 Ind. 507, a written contract was considered by which Koons conveyed to the railroad a right of way over his land, it agreeing in return to fence the right of way and also to build certain cattle-guards. The action was brought to recover the reasonable cost of the fences, which, it was averred, the company had failed to build. The defense was that in a prior

action Koons had recovered judgment for \$40 on account of the failure of the company to build cattle-guards. The Supreme Court held that the contract was entire and indivisible, and that, notwithstanding no recovery had been sought or had in the prior action, on account of the failure to fence, there could be none in a latter one, in the absence of stipulations making the dates of performance separate and different. *Indiana, etc., R. Co. v. Koons, supra*. The contract considered by the court in that case, the conclusion stated, and the reason therefor, render the case an authority in this one, and compel the conclusion that the contract now under consideration is an entire contract. Being entire for one purpose, it is entire for all purposes.

When a mortgage secures two notes, one valid and one illegal, or a bill of goods consists of various items, a specific price being fixed to each item, and in other similar cases, a different rule applies; but in the case at bar it must be held in the language of Judge Elliott: "If the promissory notes which constituted the cause of action upon which the plaintiff must recover, or not recover at all, were founded on an illegal consideration, then, no matter what the court may have instructed upon the subject of an executed consideration, the verdict is right. The defense which the answers to the interrogatories reveal renders a recovery by the plaintiff legally impossible. It cuts up his cause of action 'root and branch.' * * * The first instruction asked by appellant was properly refused. If the consideration of a promissory note is in part illegal and in part legal, and is indivisible, there can be no recovery upon the note." *Ricketts v. Harvey* (1886), 106 Ind. 564.

The present action is one in which it is not only appropriate for the court to consider the contract made by these parties, but the duty of the court to the public,

9. against whom the contract in question is directed, calls upon it to do so.

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That duty cannot be put aside until appellant comes into court asking that the illegal clause be enforced. The presumption is that it will not need ever to do this. It cannot be deferred until some quarry man or citizen institutes a proceeding to declare its invalidity. The fallacy of such an idea can in noway be so clearly exposed as by an illustration, extreme in terms, but equivalent in principle. Preliminary to the illustration, it may be recalled that this court has declared: "It is now settled here, that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal.'" *Nave v. Wilson* (1895), 12 Ind. App. 38.

If, in consideration of property conveyed or delivered, one should contract to pay money and commit crime—larceny, burglary or robbery—would any enlightened conscience entertain the idea that the vendor could recover the money consideration in court and that the illegality of the undertaking could only be set up when the crime was being consummated, and then by the unsuspecting victim? If it were to be assumed that the contract in question contains no express stipulation preventing the separation of the valid from the illegal portion of the consideration, the principle stated by the authority heretofore cited would forbid the courts from making such division.

The stipulations of the written contract make it impossible in any view that might be taken. It is premised that the consideration of a written contract may be made

10. contractual, and that it can then no more be varied than any other portion of the instrument. *Pennsylvania Co. v. Dolan* (1893), 6 Ind. App. 109, 51 Am. St. 289; *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55.

The intention of the parties controls. "Where the inten-

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tion clearly appears from the words used, there is no need to go further, for in such a case the words must

11. govern; or, as it is sometimes said, where there is no doubt, there is no room for construction."

Clark, Contracts, p. 590.

The intention is so potent that, where it appears that the parties intended the contract to be an entire one, such intention will control, and prevent its being considered as divisible, although it might so be regarded in the absence of the contrary intention. 7 Am. and Eng. Ency. Law (2d ed.), 95; *Wooten v. Walters* (1892), 110 N. C. 251, 14 S. E. 734; *Loud v. Pomona Land, etc., Co.* (1894), 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Southwell v. Beezley* (1875), 5 Ore. 458.

The contract under examination precludes the court from treating it as a divisible one. The parties deliberately carry and put the illegality into every portion

12. thereof. The language used is: "It is expressly understood and agreed that the consideration for granting the rights and privileges herein expressed to said second party, is the covenant and agreement of said second party not in any manner, directly or indirectly, to interfere with," etc. They thus say that the right to cross appellee's track was given in consideration of its undertaking not to compete with it for freight. What court will dispute them? Who will, in the face of this deliberately made agreement, say that the consideration for the right to cross was anything else? *Reagan v. First Nat. Bank* (1902), 157 Ind. 623. It is but just to appellant's attorneys, who have argued this case with distinguished ability, to say that they have not suggested such action.

Probably an interlocker and signal system ought to be constructed at this crossing. But that is not a question in this case. This leads to an affirmance of the judgment, and it is so ordered.

Henley, C. J., Comstock and Robinson, JJ., concur.
Wiley, P. J., and Black, J., dissent.

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DISSENTING OPINION.

WILEY, P. J.—I cannot concur in the opinion reached by the majority of my associates, nor in the reasoning leading thereto. That I may fully express my views upon the legal questions involved, I deem it necessary to state fully the facts stated in the complaint.

In July, 1889, the Louisville, New Albany & Chicago Railway Company owned and operated a line of railway, running north and south in and through Lawrence county, Indiana. At the city of Bedford, in said county, it maintained a station and telegraph office. At that time the Evansville & Richmond Railway Company was constructing a line of railroad in and through said county, running east and west. The latter company had to cross the former company's right of way and track, about 2,125 feet north of the former's telegraph office at Bedford. On July 29, 1889, the two companies entered into a written contract, by which the latter company bound itself to "put in and permanently maintain, protect and operate an interlocking switch and signal system" at the intersection of the two roads. In that contract the Louisville, New Albany & Chicago Railway Company is designated a "party of the first part," and the Evansville & Richmond Railway Company is designated as "party of the second part," and for convenience and brevity these terms will hereafter be used in this opinion where a reference to the two companies is necessary. By the terms of that contract the party of the first part granted to the party of the second part the right to construct and maintain its railroad over and across the main track, switches proper, and what was known as the "Blue Hole Switch," owned by the party of the first part. The crossing was to be on a grade with the road of the first party, and the point of crossing was designated.

The terms upon which the grant to cross was given may be stated as follows: The party of the second part was to

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furnish all material and perform all labor required to raise the track, known as the "Blue Hole Switch" (which was a track connecting with the main line of the first party extending to the Chicago & Bedford Stone Company), to a common grade or level with the main line, and to raise all bridges on said switch so as to conform to such grade. The second party was to perform all labor incident to the construction and maintenance of said crossing, including crossing frogs, targets, signals, etc.; and, inasmuch as the grade at the point of crossing was heavy, and trains of the road of the first party could not be stopped at said crossing, the second party agreed to put in and permanently to maintain, protect and operate an interlocking switch and signal system, of a safe and approved kind, so as to enable the first party, without violation of law, to cross at said point without having to stop its trains. The first party at all times was to have priority of right to run its trains of the same class over said crossing, as against the right of trains of the second party. If the first party at any time wished to construct additional tracks at the point of intersection, the second party, at its own expense, was to adapt its own tracks to such additional tracks, and construct and maintain one-half of all necessary crossings, frogs, targets, signals, etc. All appliances, structures, fixtures and instruments pertaining to said crossing, switches and signals were to be of such design, pattern, quality and construction as were necessary and safe in the opinion of the proper officers of the first party, and all persons employed by the second party to perform services at such crossings were to be subject to removal at the demand of the first party. The second party was to protect and save harmless the first party against all loss, damage, cost or expense which might result either in the construction, maintenance or use of the crossing, or from the acts of any person who might be appointed to perform services by the second party at the crossing.

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The sixth subdivision or clause of the contract is as follows:

“The second party agrees not to run any track or tracks to or from any stone-quarry which is connected with the road of the first party by switches or tracks built thereto by said first party or under contract therefor, and will not make any demands for the use of said first party’s tracks or switches leading to any such quarries for the shipment of stone therefrom, the express purpose of this clause being to preserve to said first party all rights and benefits now acquired in the business of such quarries; and it is hereby expressly understood and agreed that the consideration for granting the rights and privileges herein expressed to said second party is the covenant and agreement of said second party not in any manner, directly or indirectly, to interfere with or divert the benefits now derived or to be hereafter derived from said first party’s connection and business with such quarries.”

The seventh and last subdivision of the contract is as follows:

“In consideration of making a Y connection, it is agreed between the parties hereto that in case any party or parties require said first party to forward stone or other car-load freight to the line of the second party, it is agreed that the proportion of the through rate from any given quarry or station accruing to the party of the first part shall not be less than three cents per hundred pounds.”

The interlocking switch provided for in the contract has never been constructed.

This action was brought by appellant, as successor to the Louisville, New Albany & Chicago Railway Company, against appellee, the successor to the Evansville & Richmond Railway Company, upon that contract.

The complaint is in three paragraphs, to each of which a separate demurrer was sustained. Appellant, assuming that each paragraph of complaint was impregnable to a

successful assault of a demurrer, stood upon the ruling thereon, and declined to plead over. From a judgment against it for costs, it prosecuted this appeal, and by its assignment affirms that sustaining the demurrer to its complaint was error.

In each paragraph of the complaint it is averred that in 1897 appellant became the owner of all the rights and property of the Louisville, New Albany & Chicago Railway Company; that on July 29, 1889, its predecessor entered into the contract above specified, with the Evansville & Richmond Railway Company; that said last-named company was incorporated under the laws of Indiana for the purpose of owning and operating a railway from El-nora, Daviess county, to the city of Richmond, and to construct said road it was necessary to cross the line of road of the Louisville, New Albany & Chicago Railway Company in the city of Bedford, and that said contract was entered into for the purpose of securing a right to make said crossing; that at the time of the execution of said contract the Evansville & Richmond Railway Company had not completed its road, and had done no construction on the right of way or tracks of appellant's predecessor; that said company had no interest in said right of way or tracks, or right to cross the same, and entered into said contract for the sole purpose of securing said right.

Each paragraph contains the following averments: "That said Evansville & Richmond Railway Company took possession of said easement and right of way under said contract; that the only consideration received or promised for the granting of said easement and right to cross said right of way and railroad was the covenant expressed in said contract to do and perform the matters and things therein set forth." It is further averred that, acting under the right given by said contract, said Evansville & Richmond Railway Company entered upon said right of

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way and tracks, and constructed its superstructure, laid its steel and completed its railway across the same, and while it continued to own said railway it so occupied said crossing and tracks; that the Evansville & Richmond Railway Company, to secure certain bonds, executed its mortgage on its railway property, but at the time of the execution of said mortgage it had not constructed its railway at said point of crossing, and it did not then have any right to or interest in the property of appellant's predecessor, or right to cross such right of way or tracks, and that said right so to cross was not secured until long afterward, and by said contract alone; that said Evansville & Richmond Railway Company defaulted in the payment of said mortgage debts, and on this account said mortgages were foreclosed and all of its rights and property sold to pay said indebtedness; that at said sales the Evansville & Richmond Railway Company became the purchaser of said rights and property; that since said purchase the Evansville & Richmond Railway Company continued to own said railway and to operate said rights and franchises; that the corporate name thereof was afterward changed to the Southern Indiana Railway Company, and since said change in name appellee has continued to own said rights and franchises and to operate said line of railroad of its predecessor company, and has "continually occupied said crossing, and has asserted the right and title to said easement under and by virtue of the title acquired at said foreclosure sales, and not otherwise."

Each paragraph contains the following averments: "The Southern Indiana Railway Company obtained and took the right and title which said Evansville & Richmond Railway Company acquired in and to said easement in said right of way crossing, and has ever since held the same, and has always asserted its legal right to do so under said agreement, and by no other source of title."

All three paragraphs aver that on account of the steep grade on appellant's road at and near the point of crossing,

which is averred to be fifty-seven feet to the mile, it is very difficult, and at times impossible, to stop its south-bound trains before reaching said crossing; that in running its trains northward it is necessary to run at a rapid rate of speed, in order to obtain sufficient momentum to enable an engine to draw the trains up and over the grade; that on account thereof there has been and will continue to be great danger of collision, which would involve great loss of life and property; that if said interlocking switch is installed it will be impossible for trains and engines to collide on said roads at said crossing, and all danger to life and property will be thereby avoided.

Each paragraph also avers that said contracting party and its successor (the appellee) have failed and neglected to perform the conditions of said contract on their part. The second paragraph differs from the first and third, in that, in addition to all of said general averments, it alleges that, pending the receivership and foreclosure proceedings against the Evansville & Richmond Railway Company, the Louisville, New Albany & Chicago Railway Company intervened, and asked that performance of said contract be required, and that before the trustees of the bondholders of said Evansville & Richmond Railway Company or the appellee acquired any interest in said property under said sale, they had actual and constructive notice of said contract and its terms and provisions.

The prayer of the first and second paragraphs of complaint is that appellee be required to construct and maintain the interlocking switch provided for in the contract sued on. The prayer of the third paragraph is for \$5,500 damages, which appellant avers it has sustained by reason of the failure to perform the contract, and that that amount would be required to construct, etc., said interlocking switch.

Counsel for appellee directed the major part of their argument against the sufficiency of the complaint, on the

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theory that the contract sued on is *ultra vires* and void. This contention is based upon the sixth subdivision of the contract, which we have quoted, which it is averred places an inhibition on the party of the second part from running any track or tracks to or from any stone-quarry which is connected with the road of the first party. It is urged that such an inhibition is against public policy, and therefore the contract cannot be enforced.

The right of one railroad to cross another is a recognized right, and public policy and the general interests of the public require it. That right is regulated by statute in this jurisdiction. §5153 Burns 1901, cl. 6, §3903 R. S. 1881. Provision is made that, in case one railroad company desires to cross the right of way and tracks of another, and the two companies cannot "agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners," etc. Section 5154 Burns 1901, §3904 R. S. 1881, provides that "where it becomes necessary for the track of one railroad company to cross the track of another railroad company, the company owning the road last constructed at such crossing shall, unless otherwise agreed to between such companies, be at the expense of constructing such crossing in a manner to be convenient and safe for both companies."

In the absence of a contract to the contrary, when such crossing is constructed, the statute (§5155 Burns 1901, §3905 R. S. 1881) makes it the duty of each company to maintain and keep in repair its own track so as at all times to provide a ready, safe and convenient crossing for all locomotives or trains passing on either road at such point.

Independently of any statutory provision, I have no doubt of the right of two railroad companies to contract between themselves upon what terms and conditions a crossing may be constructed. Possessing such right, it carries with it the additional right to contract as to the

kind and character of the crossing and fix the burden by which it shall be maintained. This right, it must be understood, cannot be exercised to the detriment of the public, nor in contravention of public policy. Having a right so to contract, it is the duty of the courts to enforce such contracts, if they are in all things valid.

It must be kept in mind that where two railroads intersect or cross, the one last constructed does not acquire any title to the right of way, property and track of the original road, but only acquires an easement therein.

In the case I am now considering, there is no doubt but that the two original contracting companies had a right to contract between themselves, whereby the "party of the second part" bound itself to construct and maintain at the point of crossing an interlocking switch.

By entering into the contract, the "party of the first part" parted with a valuable right, in that by crossing its tracks the latter company would, to some extent at least, interfere with the free and uninterrupted use of its property, which it previously enjoyed. By virtue of the terms of the contract the "party of the second part" acquired and enjoyed all the rights and benefits thereby conferred upon it. The appellee here is now enjoying such rights and benefits by succession.

If, under the contract, appellee's predecessor acquired an easement, and of this there can be no doubt, then the first question for determination is: Did such easement pass to appellee? The complaint avers that appellant succeeded to all rights, privileges, property and contracts of the Louisville, New Albany & Chicago Railway Company, and that appellee in the foreclosure proceeding, and purchase thereunder, acquired all the rights, privileges, property, etc., of the Evansville & Richmond Railway Company.

It is hard to conceive, from a legal or equitable standpoint, how, under such conditions and circumstances, either of the succeeding companies could acquire all the beneficial

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rights, privileges, property, etc., of their predecessors, and be relieved of all their burdens.

By the terms of the contract, appellee's predecessor acquired a right of way over and across the private property of the Louisville, New Albany & Chicago Railway Company. Thus by the contract a covenant was created, which covenant runs with the use of such way, and, under the authorities, is binding upon the appellee which succeeded to the rights, etc., of one of the contracting parties. *Dayton, etc., R. Co. v. Lewton* (1870), 20 Ohio St. 401; *Midland R. Co. v. Fisher* (1890), 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. 189; *Lake Erie, etc., R. Co. v. Priest* (1892), 131 Ind. 413, 416; *Toledo, etc., R. Co. v. Cusand* (1893), 6 Ind. App. 222, 224; *Lake Erie, etc., R. Co. v. Griffin* (1900), 25 Ind. App. 138.

Appellee cannot assert its right to exercise the beneficial privileges given by the contract, and at the same time repudiate its covenants. It enjoys its easement to cross appellant's tracks, side-tracks and right of way, and unless there is something in the contract itself to exempt it from performance—as, for instance, the contract is *ultra vires*—then it is bound to perform. To permit it to retain its rights and privileges, and repudiate its burdensome obligations—its covenants—would be antagonistic to the broad and wholesome principles of equity, and shock good conscience. *Louisville, etc., R. Co. v. Power* (1889), 119 Ind. 269, 272; *Bloomfield R. Co. v. Grace* (1887), 112 Ind. 128; *Lake Erie, etc., R. Co. v. Griffin* (1886), 107 Ind. 464; *Midland R. Co. v. Fisher, supra*; *Joy v. St. Louis* (1891), 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. See, also, *Brannon v. May* (1873), 42 Ind. 92; *Hazlett v. Sinclair* (1881), 76 Ind. 488, 40 Am. Rep. 254.

The question of controlling influence, and the one possibly fraught with the greatest difficulty, is that raised by appellee—that by reason of the sixth clause or subdivision of the contract it is *ultra vires*. Under the facts pleaded,

it can only be held to be *ultra vires* upon two grounds: (1) That the contract was prohibited by statute; or (2) that it is against public policy. It is certain that there was no statutory inhibition forbidding the contract, and hence, if *ultra vires*, it is because it was against public policy. In this connection, it is well to consider, first, the power of two corporations to enter into contracts. Generally speaking, there is no question but that they possess such power.

The contracting parties here, therefore, had the right and authority to agree between themselves that "the party of the second part" might cross the right of way and tracks of "the party of the first part." The statute above cited specifically creates such right. The right to contract implies the right to fix the terms of the contract. The contract is now an executed one, viz., the appellee is in the full enjoyment of all the rights and privileges granted to its predecessor, and to which it succeeded. While it continues in the enjoyment of such rights and privileges, and in the possession and use of the easement thus granted to it, can it in equity deny the validity of the contract?

For the purposes of the determination of this question, let it be conceded that the contract was *ultra vires*. When this contract was executed "the party of the second part" had no right to any part of appellant's right of way over which to effect a crossing, except a statutory right. It did not proceed under the statute, but selected its remedy by contract. Under that contract it took possession, and still retains and enjoys possession. If inquiry should be made of appellee by what right it crosses appellant's right of way and tracks, and thus occupies the same, it would have to answer that it was by reason of the right acquired by the contract.

In *Louisville, etc., R. Co. v. Power, supra*, appellant was occupying its right of way under a deed, and it sought to deny its validity because no grantee was named therein.

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It was held that, holding the land under the deed as it did, it was bound to perform its contract to fence its right of way.

In *Midland R. Co. v. Fisher, supra*, it was held that one who takes a privilege in land to which a burden is annexed, has no right to claim the privilege and deny the responsibility of the burden. That a party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burden which the contract creating the privilege brought into existence. The court said: "The one he cannot have at the expense of the other."

The case of *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.* (1884), 19 Fed. 804, 16 Am. & Eng. R. R. Cas. 488, was where the two companies entered into a pooling agreement. While acting under the agreement, one company received money to which the other was entitled. In an action to recover for the money so received, the defendant interposed the defense that the contract was invalid. It was held that though the pooling contract was not within the corporate powers of the two companies, it could afford no defense to the Boston company when called upon to restore to the plaintiff the sum received in excess of its due. The decision was based upon the proposition that the contract had been fully executed, and the defendant had availed itself of all the benefits to be derived from it, and was therefore estopped from denying its validity.

The case of the *Central Trust Co. v. Ohio Cent. R. Co.* (1885), 23 Fed. 306, 23 Am. & Eng. R. R. Cas. 666, also involved rights growing out of a pooling contract. It was held that, whether the contract was legal or not, the question was whether one party, who had received all the expected benefits to be derived from it, should account for the fruits of its performance, which by its terms belonged to another, and which, contrary to its terms, it retained. The equitable rule was there enforced requiring an accounting.

The case of *Joy v. St. Louis*, *supra*, is supportive of the principle of law now under consideration. In that case the city of St. Louis gave two railway companies the right to construct a track through one of its parks. The agreement provided that other roads should use the track upon specific and equitable terms. Such use was granted to avoid cutting up the park by other roads. In an action to enforce that part of the agreement by one of the roads, a defense was predicated upon the proposition that the city had no right to impose such terms. In deciding the question the court said: "In order to obtain the right of way through the park, the Kansas City company subjected itself to the condition imposed by paragraph nine of the tripartite agreement, and it is right that that company and its successor should be held to a strict compliance with its covenant. The appellants, although enjoying the benefit of the \$40,000 expended by the park commissioners and of the right of way through the park, deny their liability under the agreement, without offering to return to the grantors the property obtained by virtue of the agreement. Under such circumstances these parties cannot be heard to allege that the agreement was against the policy of the law."

In *Warren v. Jones* (1862), 51 Me. 146, one of the parties sold to the other his factory and "all his trade and customers." The purchaser brought an action against the seller to prevent him from entering into the same business in violation of his contract. The seller contended that the contract was in restraint of trade, and hence was against public policy. The court tersely disposed of the question by declaring that the contract was not against the policy of the law, and, even if it was, the defendant could not profit by it and at the same time retain the consideration.

The following cases are in point and illustrative of the question under consideration. I cite them without comment: *Manchester, etc., Railroad v. Concord Railroad* (1889), 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49

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Am. St. 582; *Brooks v. Martin* (1863), 2 Wall. 70, 17 L. Ed. 732; *Wiggins Ferry Co. v. Chicago, etc., R. Co.* (1881), 73 Mo. 389, 39 Am. Rep. 519.

The term *ultra vires*, in its literal sense, means beyond the power or capacity of a corporation, company or person. This must be understood to mean lawful authority. 27 Am. and Eng. Ency. Law, 352; Century Dict.; Brown's Law Dict.; Anderson's Law Dict.

In modern jurisprudence, the defense of *ultra vires* is very generally regarded by the courts as an ungracious and odious one, and it now seems to be firmly settled that neither party to the contract can avail himself of such defense, when the contract has been fully performed by the other party, and he has received the full benefit of the performance of the contract. If an action cannot be brought directly upon the contract, either equity will grant relief, or an action in some other form will lie. 27 Am. and Eng. Ency. Law, 360; *Whitney Arms Co. v. Barlow* (1875), 63 N. Y. 62, 20 Am. Rep. 504.

It has been declared that, generally speaking, the rule of *ultra vires* prevails only where the contracts of corporations remain wholly executory. *Thompson v. Lambert* (1876), 44 Iowa 239.

Dealings of corporations, which, on their face or according to their apparent import, are within the powers granted, are not to be considered as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no presumption that the law has been violated. 27 Am. and Eng. Ency. Law, 355; *Chautauqua County Bank v. Risley* (1859), 19 N. Y. 369, 75 Am. Dec. 347; *Allegheny City v. McClurkan* (1850), 14 Pa. St. 81; *Mitchell v. Rome R. Co.* (1855), 17 Ga. 574; *Oxford Iron Co. v. Spradley* (1871), 46 Ala. 98; *Downing v. Mt. Washington R. Co.* (1860), 40 N. H. 230; *Union Water Co. v. Murphy's Flat Fluming Co.* (1863), 22 Cal. 620.

In the case of *Bissell v. Michigan, etc., R. Co.* (1860), 22 N. Y. 258, the rule was declared that when a corporation received the consideration of its contract, although it might be unauthorized, and a restitution would not do complete justice, the remedy of the other party is not confined to a suit in disaffirmance of the contract, but may be directly upon it, and would be enforced under any circumstances of controlling equity.

There are numerous authorities holding that the ground upon which the defense of *ultra vires* is most generally excluded is that of estoppel; and this, of course, is on the basis that the corporation, having received the fruits of the contract, should not be permitted to plead want of power in the corporation, and thus escape liability. This principle is fully discussed in 27 Am. and Eng. Ency. Law, 361, and numerous authorities are collected and cited.

In the contract before us, it must be kept in mind that the contract was fully executed on the part of one of the contracting parties. By it the other party got all that it bargained for, and is still enjoying its fruits. The supreme court of Colorado has held that where a corporation has received the benefit of a contract it may not deny its validity. *Denver Fire Ins. Co. v. McClelland* (1885), 9 Colo. 11.

And so there is a distinction between *ultra vires* contracts purely executory and those fully executed on one side. Such distinction is founded in reason and good conscience.

Where the contract has been fully performed by one of the parties, the infraction of the law has already taken place, which eliminates all questions of public policy, and allows the courts to deal with the contract upon equitable principles. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.* (1886), 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.* (1892), 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *Thomas v. West Jersey R. Co.* (1879), 101 U. S. 71, 25 L. Ed. 950; *Mal-*

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lory v. Hanaur Oil Works (1888), 86 Tenn. 598, 8 S. W. 396; *Darst v. Gale* (1876), 83 Ill. 136; *Bradley v. Ballard* (1870), 55 Ill. 413, 8 Am. Rep. 656.

Where one railroad corporation used the roadbed, rolling stock and equipments of another, it was held that it could not set up the defense of *ultra vires* to a bill in equity by the latter, for an accounting and return of the property. *Manchester, etc., Railroad v. Concord Railroad, supra*. The language of the court in that case is so forceful and clear that we quote the following: "The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that in equity, at least, neither party to a transaction *ultra vires* simply is heard to allege its invalidity while retaining its fruits. However the contractual power of the defendants may be limited under their charter, there is no limitation of their power to make restitution to the other party, whose money or property they have obtained through an unauthorized contract; nor, as a corporation, are they exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial." See *Memphis, etc., R. Co. v. Dow* (1884), 19 Fed. 388; *Brown v. City of Atchison* (1888), 39 Kan. 37, 17 Pac. 465, 7 Am. St. 515; *Manville v. Belden Min. Co.* (1883), 17 Fed. 425; *United Lines Tel. Co. v. Boston, etc., Trust Co.* (1893), 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231; *Buford v. Keokuk, etc., Packet Co.* (1879), 69 Mo. 611.

In *Bedford Belt R. Co. v. McDonald* (1897), 17 Ind. App. 492, 60 Am. St. 172, it was held that where a private corporation has entered into a contract, not immoral in itself and not forbidden by any statute, and it has been in good faith fully performed by the other party, the corporation will not be heard on the plea of *ultra vires*. 5 Thompson, Corporations, §6026.

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Prima facie all contracts of corporations, public or private, are valid, and it is incumbent on those who impeach them to show that they are invalid. *Smith v. Board, etc.* (1893), 6 Ind. App. 153. If there was any doubt about the correct meaning and interpretation of clause sixth of the contract, it is clarified by the seventh. It is there provided that, in consideration of making a Y connection, "it is agreed between the parties hereto that in case any party or parties require said first party to forward stone or other car-load freight to the line of the second party, it is agreed that the proportion of the through freight from any given quarry or station accruing to the party of the first part shall not be less than three cents per hundred pounds."

Thus it appears that under the contract appellee had access to all such quarries, and was entitled to receive, upon a fixed consideration, freight therefrom to be shipped over its lines. By the terms of the contract appellant was bound to deliver the freight to it. In this regard the rights of the public are protected.

It affirmatively appears from the contract itself that the switches or spurs referred to were additional facilities for handling freight. There was a separate one for each quarry or customer.

The duty of common carriers in regard to receiving freight for transportation is fixed by statute. §5185 Burns 1901, §3925 R. S. 1881. Railroad companies are not required to go off of their lines to get freight for transportation. They have filled the measure of their statutory duty to the public, in that regard, when they have established and continue to maintain fixed places and ordinarily convenient accommodations for receiving and discharging freight. The statute does not impose upon a railway company the duty of establishing a station at any particular place except at crossings, and they are only required to receive freight at the places established for that purpose. See *People v. New York, etc., R. Co.* (1887), 104 N. Y. 58, 9 N. E. 856, 58

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Am. Rep. 484; *Northern Pac. R. Co. v. Washington Ter.* (1892), 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *State, ex rel., v. Kansas City, etc., R. Co.* (1899), 51 La. Ann. 200, 25 South. 126, 14 Am. and Eng. R. R. Cas. N. S., 461; *State v. Des Moines, etc., R. Co.* (1893), 87 Iowa 644, 54 N. W. 461, 8 Am. R. R. and Corp. Cas., 1; *Florida, etc., R. Co. v. State, ex rel.* (1893), 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. 30, 8 Am. R. R. and Corp. Cas. 94.

In *Louisville, etc., R. Co. v. Flanagan* (1888), 113 Ind. 488, it was held that a railroad company was not liable for failing to furnish cars, and for not transporting goods, unless goods are offered at a regular depot, or other usual or designated place for receiving freight. 3 Wood, Railway Law, p. 1580.

It logically follows, from what I have said and the authorities, that a railroad company owes no duty to a shipper or the public to receive freight at any place other than that provided for that purpose.

An able and exhaustive discussion of the question now under consideration will be found in the following cases: *Atchison, etc., R. Co. v. Denver, etc., R. Co.* (1884), 110 U. S. 667, 682, 28 L. Ed. 291; *Missouri, etc., R. Co. v. Carter* (1902), (Tex.), 68 S. W. 159, 26 Am. and Eng. R. R. Cas., N. S., 538.

But, if that clause of the contract which seeks to prohibit the junior company from running any switches or spurs to stone-quarries, with which the senior company was then connected, etc., is invalid, as being against public policy and in restraint of trade, does it necessarily follow that it vitiates the entire contract? If that provision of the contract is void, then no inhibition is placed upon appellee from connecting its line of road with such stone-quarries by switches. If that provision can be eliminated without destroying the contract, then the remaining provisions may be enforced.

Aside from the consideration expressed in that provision, a valuable consideration moved to the junior company in its acquirement of the right to cross the senior company's tracks and right of way. By agreeing to let it so cross, it was relieved from proceeding under the statute; also from the assessment of damages and the payment thereof. A valuable consideration passed to the senior company, in that the junior company agreed to construct, equip and maintain an interlocking switch, so as to permit the uninterrupted and safe running of its trains over the crossing. These considerations were both legal and valuable, so that if the consideration expressed in the sixth clause of the contract was illegal, there is sufficient and valid consideration in other provisions to support the contract.

It is the law that where valid and illegal considerations in the same contract are susceptible of division or distinction, that part of the consideration which is legal may be enforced. *Pierce v. Pierce* (1897), 17 Ind. App. 107; *Emshwiler v. Tyner* (1899), 21 Ind. App. 347, 69 Am. St. 360.

The recent case of *Trentman v. Wahrenburg* (1903), 30 Ind. App. 304, is directly in point. That was an action on a contract, where the defense interposed was that it was void because it was in restraint of trade. The court said: "But if appellees' contention should be sustained—which it cannot—still as the complaint does not aver that this part of the contract has been violated, the contract being divisible, that part of it which is legal could be enforced."

Quoting from *Oregon Steam Nav. Co. v. Winsor* (1873), 87 U. S. 64, 22 L. Ed. 315, it is said: "It is laid down by Chitty as a result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade,

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whilst the other is not, the court will give effect to the latter, and will not hold the agreement void altogether.’ ”

So, if it be conceded that clause sixth of the contract is invalid, all of its other provisions are valid, and as that which is valid is divisible from that which is invalid, if in fact it is, the valid provisions may be enforced. And it is worthy of remark, in this connection, that appellant is only seeking to enforce that provision of the contract about which there is no question as to its validity.

This action is to enforce that part of the contract by which the junior company agreed to construct and maintain an interlocking switch. It is not, and could not be, in law or reason, contended that the two companies could not make that agreement. That agreement rests upon a sufficient consideration.

In this action no right or benefit is claimed or asserted under subdivision sixth of the contract. As it must be conceded that the provision of the contract here sought to be enforced is valid, the fact that some other provision, as asserted by appellee, is invalid, the contract being sustainable regardless of such asserted invalid provision, relief should be given to the end that that part of the contract which is valid might be enforced, and the rights and equities of the parties preserved. *City of Valparaiso v. Valparaiso City Water Co.* (1903), 30 Ind. App. 316.

In the case of *Hitchcock v. City of Galveston* (1877), 96 U. S. 341, 24 L. Ed. 659, is a very able discussion of the question we are now considering. That action grew out of a contract between appellant and appellee, by which the former agreed to improve and pave certain streets, and the latter agreed to make payment in certain bonds. The contention of the appellee was that the city had no right to issue bonds for that purpose, and that therefore the whole contract was inoperative and void. It was held that if the city had no authority to issue bonds, it did not follow that the contract was wholly illegal and void or that the plaintiff

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had no right under it. The court said: "They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. * * * The contract between the parties is in force, so far as it is lawful. * * * Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." The case of *Nebraska City v. Nebraska City, etc., Coke Co.* (1879), 9 Neb. 339, 2 N. W. 870, was where the appellee sued appellant to recover the contract price of gas furnished the city for a certain month. The city defended on the ground that the contract contained certain illegal provisions respecting the exemption of property from taxation, etc. It was held that, admitting that in the particulars designated the city authorities exceeded their powers, which was not decided, that would be no defense to the action; that under the charter they were authorized to contract for lighting the streets with gas, and to bind the city for the price agreed upon; and that so long as the city voluntarily received gaslight, under the provisions of the contract, it could not resist payment of the agreed price simply because of the alleged illegal promises as to the particular fund from which the money should be drawn. The court said: "The consideration for which these promises were made being entirely legal, and the price agreed upon being

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payable, if not otherwise, from its general fund, these objectionable provisions may, if necessary, be rejected, and the rest of the contract permitted to stand; especially where, as here, the city has received the consideration for which the promises were made. Chitty, Contracts, 574. If the company were resisting a tax levied in violation of this agreement, or if they were endeavoring to compel payment of a gas bill out of the sinking fund, the argument of counsel for the city in this behalf would be entitled to great weight, but under the issues of this case we deem it altogether inapplicable." *Argenti v. City of San Francisco* (1860), 16 Cal. 255, 264; *City of Brenham v. Brenham Water Co.* (1887), 76 Tex. 544, 4. S. W. 143; *Dodge v. City of Council Bluffs* (1881), 57 Iowa 560, 10 N. W. 886; *Maher v. City of Chicago* (1865), 38 Ill. 266.

This is not an action to enforce any right under the sixth subdivision of the contract, but to secure to appellant the consideration moving to it in the promise to construct, etc., an interlocking switch. In other words, it is an action to require appellee to do that which it agreed to do, and which it had an unquestioned right to bind itself to do.

It will be time to consider any question that may arise affecting the rights of the parties or the public, as fixed by the sixth subdivision of the contract, when that question is presented. It is not before us now. That clause of the contract may be eliminated, and the contract be enforced as to the immediate rights of the parties under it.

It is far more important to protect life and property by requiring appellee to comply with its contract to erect and maintain an interlocking switch, and more to the interest of the public, than it is to seek the aid of courts to annul a part of the contract under which the complaining party is not seeking redress, but by which it secured all the rights it desired, and still continues to enjoy such rights.

In *Russell v. Pittsburgh, etc., R. Co.* (1901), 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. 214, the court quotes ap-

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provingly from *Baltimore, etc., R. Co. v. Voigt* (1900), 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the following: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

One who seeks to put restraint upon the freedom of contract must make it plainly and obviously clear that the contract in question is void. *Payne v. Terre Haute, etc., R. Co.* (1902), 157 Ind. 616, 56 L. R. A. 472.

Common honesty, good conscience and well-settled principles of equity demand that appellee should perform the burdens of its contract while it continues to enjoy the benefits and fruits derived from it.

The judgment should be reversed, and the court below be directed to overrule the demurrer to each paragraph of the complaint.

CHICAGO & ERIE RAILROAD COMPANY v. FOX.

[No. 4,649. Filed February 18, 1904. Rehearing denied April 20, 1904. Transfer denied June 7, 1906.]

1. RAILROADS.—*Negligence.—Turntables.*—A railroad company may be guilty of negligence toward a child in leaving unguarded and unlocked its turntable. p. 273.
2. SAME.—*Negligence.—Turntables.—Implied Invitation.*—A railroad company, leaving its turntable open and unfastened, may be guilty of negligence toward a child by reason of an implied, though unintentional, invitation to use same. p. 275.
3. SAME.—*Use of Property.—Maxims.*—The maxim, "So use your own as not to injure another," is applicable to a railroad company's leaving open and unfastened a turntable where children are in the habit of congregating for play. p. 276.

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4. RAILROADS.—*Turntables.—Care Required.—Question for Jury.*
—Ordinary care is required from a railroad company in the prevention of injuries to children who may thoughtlessly use its turntable, such question being usually for the jury. p. 277.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Edward L. Fox, by his next friend, against the Chicago & Erie Railroad Company. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. *Affirmed.*

W. O. Johnston and *Johnston, Bartholomew & Bartholomew*, for appellant.

L. L. Bomberger, D. E. Kelly and *William J. Whinery*, for appellee.

BLACK, J.—The appellee, an infant, suing by his next friend, recovered a judgment against the appellant for a personal injury. At the time of the injury, and for many years before, the appellant owned and maintained, at the city of Hammond, railroad yards, side-tracks, switches, a roundhouse and a turntable, in the southern part of the city. The tracks of the appellant's railroad ran nearly north and south, and the tracks of the Monon railway company, west of the appellant's grounds, and running nearly parallel with the appellant's tracks, were graded up between two and three feet. Douglass street crossed these tracks about two thousand feet north of the turntable, and bounded appellant's yards on the north. About thirty-six hundred feet south of the turntable another street, crossing the tracks, bounded the appellant's yards on the south. The east side of Harrison park, a public park of the city, was west of the Monon tracks, and about three hundred feet from the turntable, which was situated in the western part of appellant's yards, in front of the roundhouse. Webb street, running east and west, ran along the north side of Harrison park, and terminated at the west side of the Monon tracks, nearly opposite the roundhouse and turntable,

while from that terminal point Park avenue extended northward along the west side of the Monon tracks.

The southern portion of the appellant's grounds was enclosed by a wire fence, which ran east and west, passing about three feet south of the roundhouse. A beaten path ran from the Monon railway, at a point about sixty feet south of Webb street, eastward between the wire fence and the roundhouse, and thence northeastward to the turntable, in front of the roundhouse, and about one hundred eighty feet east of it. The grounds in which the roundhouse and the turntable were situated were unenclosed. A short distance north of the turntable was a large excavation on the appellant's grounds, filled with water and used as a swimming pool. The roundhouse was in a dilapidated condition, and was not used by the appellant; but the turntable was occasionally used for turning locomotives, which were brought upon it by a track which approached from the north, and connected with the track upon the turntable. Harrison park, containing twenty-five or thirty acres, was resorted to for picnicing and general outing in summer, and for skating and coasting in winter. Carroll street, one square north of Webb street, and parallel with it, extended eastward to the Monon railway. There was a path extending from Webb street across the Monon railway to the west wall of the roundhouse, and thence around its north side to the north side of the turntable. Opposite the east end of an alley which ran east and west between Carroll and Webb streets, another path extended southeastward, passing the north side of the roundhouse, to the turntable. There was also a path from Williams street, one square north of Carroll street, which ran southeastward to the Monon tracks, and thence around the north side of the swimming hole. All these paths united with a path running along the tracks of the appellant. The turntable had an iron frame fifty-eight feet in diameter, and turned on a pivot, above an excavation eighteen inches in depth, and was supported at the circum-

ference by wheels which ran on a track extending around the excavation. The frame was floored over, and had a track of two rails, and two handles at opposite sides for turning the table. It was used for turning freight engines, mostly, sometimes three or four times a day, and sometimes once or twice a week. The rails of the track upon the turntable and those of the side-track connected with the table came close together when opposite to each other. The roundhouse and the turntable could be seen from the park, and were within six hundred feet of the nearest dwelling-house. The turntable was permitted by the appellant to remain unfastened. The roundhouse and the turntable were frequently resorted to as playing places by the children of the city, and they had been so used for a number of years before the appellee's injury. The railroad grounds and tracks in the vicinity of the turntable were traversed daily by large numbers of people going to and from their work, and were frequented by children who played in Harrison park, especially when they were attending picnics. Appellant's employes and its man in charge of the roundhouse and turntable frequently had seen children playing on the turntable, and such employes had more than once turned the table for children to ride on it, and had given children permission to turn the table, provided they would restore it to its former position. Appellant's agent in charge of its yards and tracks at Hammond knew that children frequented the turntable; but the employes of the appellant had never driven children away from the turntable, or forbidden them to use it or to ride upon it, or taken any active measures to prevent them from using it. On two occasions before the injury of appellee, children six or seven years old had been injured while playing on the turntable, and one of appellant's employes had carried away from the turntable a child injured there.

The appellee, who was a boy not quite six and one-half years old, resided with his parents on Douglass street.

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With the knowledge and consent of his father, he left his home after noon on Sunday, December 1, 1901, to go about five blocks, to visit some boy friends residing at the corner of Webb street and Homan street, which ran north and south along the west side of Harrison park. He had often before been at the home of these friends, having lived in their neighborhood, and having been in the habit of playing with them. He afterward went across the street into Harrison park, and across the park to the Monon tracks, at a point south of the turntable, seeking his brother and another boy. There he met two boys about thirteen years old, going north along the Monon railway, and, at their suggestion, walked with them northward toward his home along that railroad. When they came to a point on the railroad opposite the turntable, and not on the appellant's grounds, the appellee noticed the turntable, and asked the other boys to go with him to it and give him a ride on it, which they did, going eastward along the path which ran between the wire fence and the roundhouse. The appellee had ridden on the turntable before. The appellee sat down on the west side of the turntable, and the other two boys moved it around by pushing upon its handles. The turntable was not fastened, but was open, the track thereon extending east and west. When the appellee, thus situated, had ridden about one-fourth of the way around, and had arrived at one of the rails of the track for the passage of locomotives on to and off of the turntable, the rails of which projected over the brink of the excavation so as to meet the rails of the track upon the turntable, the appellee was caught by the projecting rail, and his left leg was torn and crushed, the bones thereof being broken, and his right leg was severely lacerated. He was carried home by the other two boys, and thence he was removed to a hospital, where, after some weeks of nursing, his left leg was amputated.

As the case is presented by counsel, no matter for decision is before us, except the question as to the duty of the appel-

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lant toward the appellee with respect to the turn-
1. table, taking into consideration all the facts of the case. Assuming that a railroad company is under no obligation to lock or otherwise fasten or render immovable or to guard its turntable, so situated, when not in use for the purpose for which it was constructed and maintained, so as to prevent a like injury under like circumstances to a person capable of appreciating the danger, it does not necessarily follow that no such obligation exists with reference to a child, who, because of its immaturity and consequent want of reason and judgment, is not chargeable with negligence, or is capable of only a small degree of care for its own safety.

In *Lynch v. Nurdin* (1841), 1 Q. B. *29, the defendant's cart, in charge of his servant, having been left standing unattended, in a street, where there were a number of children playing, while the cartman went into a house, the plaintiff, under seven years of age, climbed upon the cart. Another boy led the horse a few steps, the plaintiff fell off, and, the wheel running over him, his leg was thereby broken. The defendant was found liable, and, although it was considered that the plaintiff was a trespasser, and contributed to his injury by his own action, it was held that the trial judge properly left to the jury whether the defendant's conduct was negligent, and whether the negligence caused the injury. In the course of his opinion, Lord Denman, C. J., observed, that if it were probable that "large parties of young children might be reasonably expected to resort to the spot, * * * it would be hard to say that a case of gross negligence was not fully established. But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we

think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them."

In *Binford v. Johnston* (1882), 82 Ind. 426, 42 Am. Rep. 508, the defendant had sold pistol cartridges to two brothers aged ten and twelve years, respectively, and a toy pistol loaded with one of the cartridges was left by these boys lying on the floor of their home. The pistol having been taken up by another brother, aged six, and discharged, the ball struck and fatally wounded one of the two boys who purchased the cartridges. In the discussion of the case, the Supreme Court cited *Lynch v. Nurdin, supra*, with approval.

In *Indianapolis, etc., R. Co. v. Pitzer* (1887), 109 Ind. 179, 58 Am. Rep. 387, the court, after saying that intruders, whether infants or adults, cannot, as a general rule, impose any duties upon the person on whose property they intrude, and citing thereto a number of cases, said further: "These cases are to be discriminated from those in which one places dangerous agencies where trespassing children are likely to be injured by them; for here the company did what it was perfectly lawful for it to do, and that was to run a passenger-train in the manner in which such trains are usually managed. The class of cases to which we refer, although numerous, have no application here." Citing a number of cases, among them *Lynch v. Nurdin, supra*, and *Binford v. Johnston, supra*. And the court went on to say: "The cases last cited all recognize the rule that children of tender years are not to be treated as persons of mature years. This is a reasonable and humane rule, and any other would be a cruel reproach to the law." See Beach, Contrib. Neg.

(3d ed.), §§137, 140; *Birge v. Gardner* (1849), 19 Conn. 507, 50 Am. Dec. 261, cited in *Indianapolis, etc., R. Co. v. Pitzer, supra*. *Sioux City, etc., R. Co. v. Stout* (1873), 17 Wall. 657, 21 L. Ed. 745, also cited in *Indianapolis, etc., R. Co. v. Pitzer, supra*, was like the case at bar, and there, as here, the defendant rested its defense on the ground that the company was not negligent. The court approved an instruction which submitted that question to the jury. See *Stout v. Sioux City, etc., R. Co.* (1872), 2 Dill. 294, Fed. Cas. No. 13,504; *Union Pac. R. Co. v. McDonald* (1894), 152 U. S. 262, 270, 14 Sup. Ct. 619, 38 L. Ed. 434; *Beach, Contrib. Neg.* (3d ed.), §207.

The duty of the defendant in such cases may be based upon what we, perhaps, may call one species of implied invitation, not involving the actual intention or wish

2. of the defendant that the plaintiff should come upon the defendant's premises or do the act which results in his injury, but consisting in leaving a thing exposed and unguarded which is of such nature as to tempt and allure young children or others not *sui juris* to play with it or otherwise use it, at a place where, within the knowledge of the defendant, such incompetent persons assemble or are likely to do so, the injurious thing being such that the defendant may enjoy the use of such property for the purpose to which it is adapted and for which it is intended, without leaving it in a condition thus dangerous to such persons, but at slight expense may so secure it, when not in such use, that it will not be thus dangerous. The so-called invitation, or tortious allurement, which would be a violation of duty, will not be involved where the defendant cannot carry on his lawful business or pursuit in the necessary and ordinary manner, and at the same time take precautions to prevent injury to such incompetent persons through the indulgence of their natural instinct to seek enjoyment or diversion; in which case, the injury being attributable, not to the fault of the injured person, but rather to the indulgence of an

innocent instinct, no blame is attached to the defendant. Thus, for instance, would be the case of the intrusion of a child upon a railway train during its temporary stoppage at a station, for the discharge and the reception of passengers, where the child enters the car along with other persons. In such case the railway company does nothing not incident to the usual and necessary way of conducting its lawful business. So might be the case of a child jumping upon the steps of a moving railway train. But a turntable, not constantly, but only occasionally, used to change the direction of locomotive engines, may, without undue interference with the company's full enjoyment thereof, be securely fastened, when not in use, without great expense or inconvenience; and such precaution may even tend to the preservation of the property itself, which, however, would be a matter within its own discretion. To take such precautions that others shall not use the appliance is not injurious to the company or a hindrance to the prosecution of its lawful business. It is not an undue application of the maxim of the law commanding one so to use his

3. own as not to injure another, to hold that the unnecessary exposure of one's property, attractive and alluring to children, but dangerous, at a place, though on his own premises, where the owner so exposing his property knows, or has good reason to believe, that children do or will come for the indulgence of the natural inclination or instinct of young persons to ride upon moving objects, or otherwise to divert themselves in a manner to which such dangerous object is adapted, involves such disregard for the safety of such incompetent persons as to amount to what may be called unlawful allurement, and as to be attributable as an implied invitation, in a case where, but for such incompetency of the injured person, he would be regarded as a trespasser or a mere licensee.

The following from Cooley, Torts (2d ed.), *303, is quoted in *Union Pac. R. Co. v. McDonald*, *supra*: "In the

case of young children and other persons not fully *sui juris* an implied license might sometimes arise when it would not on behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it."

In 2 Thompson, Negligence (2d ed.), §1827, referring to the subject of injuries to children from unguarded and unfastened railway turntables, it is said: "In view of its great danger to children, so shown by the numerous cases in the law books founded upon injuries of this kind, the just and humane conclusion must be that if the railway company can, at slight expense or inconvenience to itself, keep it guarded from trespassing children or locked so that they cannot use it, it should be held bound to do so, and should stand liable in damages if, in consequence of the failure of this duty, a child of tender years, to whom contributory negligence cannot be imputed, is injured while playing with it. This, on the one hand, allows the railway company the reasonable use of its property, while at the same time it refuses to release it from those obligations of social duty which rest upon all men in a state of civilized society." See, also, 1 Thompson, Negligence (2d ed.), §1036 *et seq.*

The care which it is the duty of the railway company to exercise in such a case is that degree of care which an ordinarily prudent person would, under similar circum-

stances, use to prevent injury to children. *O'Malley v. St. Paul, etc., R. Co.* (1890), 43 Minn. 289, 45 N. W. 440. In *Barrett v. Southern Pac. Co.* (1891), 91 Cal. 296, 27 Pac. 666, 25 Am. St. 186, an action to recover damages for personal injury to the plaintiff, a boy of eight years of age, sustained while riding on a railway turntable, it was said: "If defendant ought reasonably to have anticipated that [by] leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to

occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playground for children." The question as to the defendant's negligence was held to be one to be decided by the jury.

In *Alabama, etc., R. Co. v. Crocker* (1901), 131 Ala. 584, 31 South. 561, it was said: "It is the apparent probability of danger, rather than the rights of property, that determines the duty and measure of care required of the author of such a contrivance, for ordinarily the duty of avoiding known danger to others may under some circumstances operate to require care for persons who may be at the place of danger without right." In such case, where an object on one's premises has caused injury to another, the question as to the usefulness of the object to the owner, by way of contributing to the full enjoyment of his right of proprietorship, may enter into the consideration of the question of negligence in the maintenance of the object in the condition which occasioned the injury; but, also, it should be considered, in such connection, whether such enjoyment may be had consistently with safety to others, at such slight expense and inconvenience as the due consideration of the known or probable danger to others, under all the circumstances, would suggest to a reasonably prudent person in the use of his own property of the particular kind in question in like situation and condition. See *Koons v. St. Louis, etc., R. Co.* (1877), 65 Mo. 592; *Ferguson v. Columbus, etc., Railway* (1885), 75 Ga. 637; *Ferguson v. Columbus, etc., Railway* (1886), 77 Ga. 102; *Ilwaco R., etc., Co. v. Hedrick* (1890), 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; *Union Pac. R. Co. v. Dunden* (1887), 37 Kan. 1, 14 Pac. 501; *Gulf, etc., R. Co. v. Styron* (1886),

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66 Tex. 421, 1 S. W. 161; *Gulf, etc., R. Co. v. McWhirter* (1890), 77 Tex. 356, 14 S. W. 26, 19 Am. St. 755; *Callahan v. Eel River, etc., R. Co.* (1891), 92 Cal. 89, 28 Pac. 104; *Keffe v. Milwaukee, etc., R. Co.* (1875), 21 Minn. 207, 18 Am. Rep. 393; *Kansas Cent. R. Co. v. Fitzsimmons* (1879), 22 Kan. 686, 31 Am. Rep. 203; *Nagel v. Missouri Pac. R. Co.* (1882), 75 Mo. 653, 42 Am. Rep. 418; *Evansich v. Gulf, etc., R. Co.* (1882), 57 Tex. 126, 44 Am. Rep. 586. The four cases last above cited are also cited in *Indianapolis, etc., R. Co. v. Pitzer, supra*. See, also, *Ft. Worth, etc., R. Co. v. Robertson* (1891), (Tex.), 16 S. W. 1093, 14 L. R. A. 781; *Edgington v. Burlington, etc., R. Co.* (1902), 116 Iowa 410, 90 N. W. 95, 57, L. R. A. 561; *Chicago, etc., R. Co. v. Krayenbuhl* (1902), 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; *San Antonio, etc., R. Co. v. Skidmore* (1901), 27 Tex. Civ. App. 329, 65 S. W. 215; *City of Pekin v. McMahon* (1895), 154 Ill. 141, 39 N. E. 484, 45 Am. St. 114, 27 L. R. A. 206; *Young v. Harvey* (1861), 16 Ind. 314; *Graves v. Thomas* (1884), 95 Ind. 361, 48 Am. Rep. 727; *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 58 Am. Rep. 65; *Penso v. McCormick* (1890), 125 Ind. 116, 9 L. R. A. 313, 21 Am. St. 211; *Cincinnati, etc., Spring Co. v. Brown* (1903), 32 Ind. App. 58. Judgment affirmed.

 DARMAN v. DARMAN.

[No. 5,772. Filed June 8, 1906.]

DIVORCE.—Cruel Treatment.—Evidence.—Appeal and Error.—In a suit for divorce where the parties are both young and the alleged cruel treatment as shown by the evidence consisted of small disputes and bickerings caused largely by foolish and stubborn pride and by the husband's failure to make allowances for the weaknesses of his young wife, the refusal of the trial court to grant such husband a divorce will not be disturbed on appeal.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Suit by William H. Darman against Carrie Darman. From a decree for defendant, plaintiff appeals. *Affirmed*.

Crumpacker & Daly, for appellant.

Johnston, Bartholomew & Bartholomew, for appellee.

BLACK, J.—In the suit for a divorce by the appellant, the husband, the court found and adjudged in favor of the wife, the appellee. It is contended that the finding was not supported by sufficient evidence. The parties were young, and they lived together as husband and wife but a few months, part of the time in the family of the husband's father, and the remainder of the time in the immediate neighborhood of that family.

There was some evidence from which the court might have inferred that the appellant was, or permitted himself to seem to be, influenced in his conduct toward his wife by deference to the opinions and wishes of members of that family, disregarding to some extent the feelings and opinions of his wife, which possibly may have been somewhat unreasonable. There were some matrimonial bickerings, concerning which each party ought to have been, and possibly was, ashamed of his or her part therein; but they perhaps were controlled by foolish and stubborn pride, the husband seemingly not understanding and not making due allowances for the weaknesses of the young wife, and not cherishing her as a sensible man should do. Much discretion must be allowed to the trial court in such cases. The interests of society in the marital union should be kept in view, and the bond of matrimony should not be dissolved because of marital difficulties which may be remedied consistently with the honor and happiness of both parties.

In this case the only charge was that of cruel treatment, and we could scarcely have agreed with the trial court if it had granted a divorce upon the evidence in the record.

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Certainly, we are not disposed to interfere with the court's exercise of its discretion in favor of the preservation of the family relation.

Judgment affirmed.

MATLOCK ET AL. v. LOCK ET AL.

[No. 5,013. Filed January 26, 1905. Rehearing denied June 9, 1905. Transfer denied June 8, 1906.]

1. **WILLS.—Construction.—Intention.**—Courts are guided in the construction of a will by the intention of the testator, and where not in contravention of law, such intention will be given effect. p. 292.
2. **SAME.—Estates Devised.—Determinable Fee.**—A will devising in fee, to a grandchild, certain real estate provided such grandchild pays all taxes, keeps up necessary repairs and does not encumber by mortgage or sell said real estate before she arrives at the age of forty, and if she die or “attempt to convey, mortgage or encumber all or any part of said real estate,” then over to other devisees, creates in such grandchild a determinable fee. *Per Roby, J., and Comstock, C. J.* It creates a conditional fee. *Per Wiley, J.* p. 293.
3. **SAME.—Real Estate.—Alienation.—Suspending Power of.—Statutes.**—A will devising lands to a grandchild and if such grandchild shall, before she arrives at the age of forty, “attempt to convey, mortgage or encumber all or any part of said real estate,” then over to other devisees, does not violate §3382 Burns 1901, §2962 R. S. 1881, providing that the power to alienate shall not be suspended longer than the existence of a life in being, etc., since such devisee is a life in being at the time such will takes effect. p. 304.
4. **SAME.—Bequests.—Trusts.**—A bequest to testator's grandchild to be held in trust until such grandchild arrives at the age of forty, at which time such bequest shall be delivered absolutely, is valid and it is the duty of the trustee to administer such trust until such time arrives. p. 306.

From Rush Circuit Court; *Douglas Morris*, Judge.

Suit by Mellie Lock and others against Martha E. Matlock and others. From a decree for plaintiffs, defendants appeal. *Reversed.*

Smith, Cambern & Smith, for appellants.

Will M. Sparks, Cullen & Megee and Douglas Morris,
for appellees.

WILEY, J.—Suit by appellees against appellants for the construction of a will and to quiet title to real estate. The complaint was originally in three paragraphs, to the first of which a demurrer was overruled. An answer was filed in denial, and subsequently appellees dismissed their third paragraph of complaint, which asked for a partition of the real estate.

Trial by the court, and upon proper request a special finding of facts was made and conclusions of law stated thereon. The substance of the conclusions of law is that, under the will in controversy, the appellee Mellie Lock took a fee-simple title to the real estate involved, upon the death of the decedent, who was her grandfather, and that certain provisions of the will which attempted to fix and designate specific conditions upon the contingency of which the fee-simple title should rest in Mellie Lock were invalid and void.

The errors assigned are that the court erred in overruling the demurrer to the first paragraph of the amended complaint, and that the court erred in each of its conclusions of law.

It is questionable whether appellants are entitled to have considered the question raised by overruling their demurrer to the first paragraph of the amended complaint, in that counsel have not specifically, in argument, stated any objections to said paragraph, or cited any authorities in support of the contention that the paragraph is insufficient.

The fact that the court made a special finding of facts, stating its conclusions of law thereon, is sufficient to present every question that affects the interests of the contending parties, and it is unnecessary, therefore, for us to consider or pass upon the sufficiency of the pleadings.

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Elisha King was the testator and the father of appellant Martha E. Matlock, and the grandfather of appellee Mellie Lock. At the time the testator executed his original will he had one daughter, the appellant Martha E. Matlock, and three grandchildren living, one of whom was appellee Mellie Lock, and a childless, second wife. In his original will he made certain bequests to all of the persons named. Before his death, however, two of his grandchildren died without issue, and upon the death of each of them he executed a codicil to his will. After his death the appellant Martha E. Matlock qualified as executrix and trustee under the will, and before the commencement of this suit, by an agreement between all of the parties in interest, the widow elected to take under the law and not the will, and in this controversy she has no interest. Appellee Mellie Lock is the mother of one child living. Martha E. Matlock was made a party both in her individual and fiduciary capacity.

The facts to which the law must be applied, and the respective rights of the parties determined, as disclosed by the special findings of the court, are as follows: Elisha King died testate on February 6, 1902. He left a will and two codicils, which were duly executed and probated. He left, as his only heirs, except his widow, appellant Martha E. Matlock, his daughter, and appellee Mellie Lock, his granddaughter. The court further found that the will and the two codicils of the testator had been duly filed and admitted to probate; that appellant Martha E. Matlock had qualified and was acting as executrix and trustee under the will. The special findings set out in full the will and the two codicils, but it is only necessary for us to refer to those provisions of the will that are to be construed in the determination of the rights of the respective legatees. But to do so it is important, so as to gather the full intent of the testator, to set out such provisions of the will and codicils at some length.

By item two of the will the testator makes certain and specific provisions for his wife, which include, among other things, a life estate in certain real estate of which the testator died seized, and which is specifically described. After such provisions made for the wife, said item number two continues as follows:

“And at her death I will and devise in fee all of the above-described real estate equally to my daughter Martha E. Matlock and my grandchildren, Ulysses, son of my son Henry C. King, deceased, Tennie B. King, daughter of my son Samuel F. King, deceased, and Mellie McFatridge, daughter of my daughter Indiana McFatridge, deceased. Provided, that my above-named grandchildren shall pay their part of all taxes and keep up all necessary repairs on their part of said real estate and not encumber by mortgage or sell their respective interest in said real estate before they shall severally arrive at the age of forty years. And provided further that if either of my above-named grandchildren shall die before their arrival at the age of forty years leaving a child or children born in wedlock living, their respective child or children shall have their share in said real estate. And it is provided further that if either of my said grandchildren shall die without leaving any living child or children before their arrival at the age of forty years, their interest in said real estate shall go equally to my said daughter and if she is dead her part to her children and to my surviving grandchildren above named, or if they are dead then to their living children share and share alike. It is my will that my daughter Martha E. Matlock is to have her interest in said real estate without any reservation except as above set forth.”

By item three the testator devises and bequeaths to appellant Martha E. Matlock certain described real estate, upon which he fixed the value of \$13,000, and in said item he also devises and bequeaths to her “one equal one-fourth part” in value of all of the other real and personal estate belonging to him, not otherwise disposed of in said will.

By item four he devises and bequeaths to his grandson Ulysses King certain real estate, specifically describing it. Upon this bequest and in the same item he made the following provision:

“Provided that he will pay all taxes and keep up all necessary repairs on all of the above-described real estate, and not mortgage or in other manner encumber the same or any part thereof before he arrives at the age of forty years. I value said land at \$13,000. I also give and devise unto said Ulysses, the undivided one-fourth part in value belonging to me all other property not otherwise disposed of by me upon the same terms and conditions as above set forth (I mean by the word property both real and personal property not otherwise disposed of herein). It is further my will that if he should die before arriving at the age of forty years leaving surviving him a child or children born in wedlock, that the above-described real estate last described and all property herein bequeathed to him both real and personal shall go to his then living child or children. And it is further provided and is my will that if the said Ulysses shall die before his arrival at the age of forty years without leaving either a child or children, that the interest in my estate herein bequeathed to him shall go share and share alike to my said daughter and grandchildren surviving, or to their children then living. It is my will that said Ulysses shall have at my decease immediate possession of all the real estate herein specifically willed him and the rents and profits thereof after the payment of all taxes and necessary improvements thereon, and the annual interest on the one-fourth part of my personal property or rents of real estate not otherwise disposed of herein. It is my will that upon his arrival at the age of forty years all restrictions above mentioned on his interest in my estate be removed.”

By item five he devises and bequeaths to his granddaughter Tennie B. King certain property, both real and personal, specifically describing it, and places upon it the following conditions:

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"She to have all the above property both real and personal upon the same terms and conditions as my grandson Ulysses herein set forth."

By item six he devises and bequeaths to his granddaughter Mellie McFatridge certain real and personal property, describing the same, upon which he places a value of \$13,000, and the following further bequest:

"Also the one-fourth part in value of all other real and personal property owned by me at my decease. She to have all of said real estate and personal property upon the same terms and conditions as that willed to my said grandson Ulysses King."

In this same item he charges all of the above-named heirs with specific advancements, giving the amount advanced to each one.

The final clause in the will is as follows:

"My object in making this will is to make my said child and grandchildren equal in the final distribution of my estate."

In codicil number one, executed on September 25, 1891, the testator recites the fact that, since the execution of his original will, his grandson Ulysses King has died, and by said codicil he makes certain other provisions as follows:

"I hereby devise and bequeath to my daughter Martha E. Matlock all the real estate devised by item four of said will to said Ulysses King and the same is to be charged to my said daughter at the sum of \$13,000."

He then proceeds in said codicil to make certain devises and bequests to his granddaughters Tennie B. King and Mellie McFatridge, in the following language:

"I devise to my granddaughters Tennie B. King and Mellie McFatridge each real or personal estate of the value of \$13,000 to equalize them with said Martha E. Matlock, on the terms and conditions herein-after mentioned. The residue of my estate not herein devised, which includes the fee of the real estate de-

vised to my wife and all the other real and personal property of which I may die seized, I dispose of as follows, after the payment of expenses of settling my estate and equalizing the advancements as set out in my will and the payment of the monument as provided for, I devise one-third to my daughter Martha E. Matlock, and I devise one-third to my granddaughter Tennie B. King, and one-third to Mellie McFatridge, the last two devisees as well as all property devised to said Tennie B. King and Mellie McFatridge in the original will and in this codicil upon the following conditions and restrictions: Said Tennie B. King and Mellie McFatridge to have the rents and profits of the real estate received by them until they arrive at the age of forty years and to keep all taxes and liens paid on said real estate and said Tennie B. King and Mellie McFatridge shall have no power to mortgage or convey said real estate until they arrive at the age of forty years. And in case they or either of them attempt to convey, mortgage or encumber all or any part of said real estate, it is my will that they forfeit all right, title and interest to that part of said real estate so attempted to be conveyed by them, and my executor or the trustee appointed under this will shall take charge of said real estate attempted to be conveyed and hold the same until the party attempting to make such conveyance arrives at the age of forty years, the rents and profits during said intervening time to go to my other heirs. All the personal estate or moneys received by my executor from the sale of any land or lands to be placed at interest on first mortgage security and kept at interest by a trustee to be appointed as hereinafter indicated, and after paying taxes and expenses the interest to be paid annually to said Tennie B. King and Mellie McFatridge. When said Tennie B. King and Mellie McFatridge or either of them arrives at the age of forty years their shares in said personal estate shall be surrendered to them as they arrive at such age, and the real estate above mentioned shall become theirs absolutely. I hereby appoint my daughter Martha E. Matlock executrix of this my last will and a trustee to take charge of the personal estate as hereinbefore mentioned."

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By codicil number two, executed on January 6, 1900, the testator recites the death of his granddaughter Tennie B. King, and proceeds with the disposition of his estate as follows:

“My granddaughter Tennie B. King having died since the making of said will and codicil, I hereby devise and bequeath to my granddaughter Mellie Lock, formerly McFatridge, all the real estate devised in item five of said will to said Tennie B. King on the same terms as to rents, alienation, mortgages and possession as the same was devised to said Tennie B. King by said will and codicil number one, and on the same terms as the other real estate is devised to said Mellie Lock in said will and codicil, the same to be charged in the division of my estate to Mellie Lock at the sum of \$10,000. I also give and bequeath to said Mellie Lock, lots numbered 168 and 169 in Payne, Reeve & Allen Trustee’s Addition to Rushville, Indiana, on the same terms and conditions as all the other real estate devised in said will and codicil is devised to said Mellie Lock, the same to be charged to her in the division of my estate at the sum of \$3,000. I revoke so much of codicil number one as devises to my granddaughters Mellie McFatridge, now Lock, and Tennie B. King real and personal estate of the value of \$13,000, and in lieu thereof devise to my said granddaughter Mellie Lock, out of my personal estate, a sum sufficient to equalize her in the division of my estate with Martha E. Matlock, the same devised on the terms and conditions set out in codicil number one of my said will. I give, devise and bequeath to Martha E. Matlock the south end and halves of lots seventeen and eighteen, block sixty-nine, city of Lincoln, Nebraska. I give, devise and bequeath to Mellie Lock, my granddaughter, the north end and halves of lots seventeen and eighteen, block sixty-nine, city of Lincoln, Nebraska, on the same terms and conditions as real estate is devised to her in my original will and codicil number one. I have kept a book of advancements which shall be final and determine all questions of advancements on a final division of my estate. It being my true in-

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tent by this will and codicils that one-half of my estate considering all advancements shall go to Martha E. Matlock, and one-half to Mellie Lock, subject to all conditions, limitations and restrictions as set out in said will and codicils thereto."

The court further found that the widow of the testator elected to take under the law, and that an agreement was made between her and appellant Matlock and appellee Lock by which she accepted certain interests in the estate, and released the estate from all other liability. The court found that Ulysses S. King and Tennie B. King, grandchildren of the testator, died prior to his death; that Mellie McFatridge, the testator's grandchild, was married to James Lock on December 8, 1898, and that said Mellie Lock was twenty-eight years old at the time of her grandfather's death; that Mellie Lock was the mother of Mildred Lock, who is an infant, and who was a party below and appeared to the action by a guardian *ad litem*; that said Mildred was born prior to the death of the testator; that Martha E. Matlock, since the death of her father, has entered into and is now in possession of all the real estate willed to her; that appellee Mellie Lock has entered into and is now in possession of all the real estate specifically devised to her, but that she has received no part of the personal property nor any part of the real estate not specifically devised to her by said will, but belonging to her by virtue of the residuary clauses in said will and codicils; that all the real estate belonging to said estate, not specifically devised, is now, and has been since the death of the testator, in the possession and control of Martha E. Matlock, trustee, she claiming the right to possession and control thereof as trustee by virtue of the will and codicils; that said Martha E. Matlock, as executrix of said will, is now, and has been ever since her qualification as such, in possession of all the personal property belonging to said estate, claiming the right to receive the one-half part thereof as trustee for

Mellie Lock upon the final settlement of said estate, and holding the same until said Mellie Lock arrives at the age of forty years.

The court further found that the personal property and choses in action of the estate aggregate in value \$23,980.70 as shown by the appraisement, but that the actual value is in excess of that amount; that the residence in which Mellie Lock lives, and the only place she has to live, was built more than forty years ago, is in need of repair, and that said Mellie Lock has no means other than that held by Martha E. Matlock, as executrix and trustee, which the latter refuses to pay to the former, although all of the debts of the estate have been paid. The court also found that the real estate specifically devised to Mellie Lock is in bad repair, and that she cannot get the benefit of the same without spending large sums in making such repairs, and that to do so it will be necessary to use the personal property, or the proceeds arising from the sale of the same, or mortgage or encumber said real estate; that there is certain real estate, of which the testator died the owner, not specifically devised, and that Martha E. Matlock claims the right to the possession thereof and to all the personal property as trustee for said Mellie Lock until she arrives at the age of forty years, and refuses and will continue to refuse to pay said Mellie Lock any part of the proceeds arising from the sale of the personal property, or to deliver to her any part of the share in the Rush County National Bank, or to permit said Mellie to exercise any control over the real estate not specifically devised, before she arrives at the age of forty years; that said Martha E. Matlock, as executrix and trustee, is holding all the personal property of which decedent died seized, amounting to about \$25,000; that she claims to hold the same pursuant to the terms of said will, and now threatens to continue holding, as trustee, said Mellie Lock's one-half interest in said personal property until she arrives at the age of forty years. The court

then proceeds to find and state specifically the real estate which Mellie Lock took possession of and now holds, and finds that each of the defendants (appellants here) is claiming some interest in said real estate adversely to her.

As conclusions of law the court stated: (1) That the testator, Elisha King, did not die intestate as to any of his property, real or personal; (2) that appellee Mellie Lock is now, and has been since the death of the testator, the sole owner in absolute fee simple of certain described lands, and that all restrictions set forth in the will and codicils against the appellee's right to alien or encumber same are void, and that she is entitled to a decree quieting her title to said lands; (3) that by the provisions of the will and the codicils appellee Mellie Lock is now, and has been since the death of the testator, the owner in absolute fee simple, as tenant in common with the defendant Martha E. Matlock, of the undivided one-half of certain described lands, and that all restrictions in said will and codicils against her right to alien and encumber the same are void, and that the claim of appellant Martha E. Matlock to hold said undivided one-half of said lands, as trustee, until said Mellie arrives at the age of forty years, is invalid, and that she is entitled to have her title thereto quieted; (4) that said Mellie Lock, by virtue of the will and codicils, is the owner in fee simple absolute, as tenant in common with appellant Martha E. Matlock, subject to the life estate of the widow, of the undivided one-half of certain described lands, and that all restrictions in said will and codicils against her right to alien and encumber the same are void, and that she is entitled to a decree quieting her title therein; (5) that by virtue of the provisions of the will and codicils, the title to all the personal property of the testator vested in Mellie Lock and Martha E. Matlock, subject to the payment of his debts, his widow's rights and the expense of administration, and that on the final settlement of said personal estate, after equalizing advancements, the remaining per-

sonal estate should be divided equally between Mellie Lock and Martha E. Matlock; that said Mellie is entitled to said personal property, free from any trust or restrictions, to hold the same absolutely and in her own right.

In the construction of a will, courts must regard the intention of the testator, if such intention can be ascertained from the will itself. When such intention is ascer-

1. tainable, it is the duty of courts to respect the clearly expressed wishes of the testator, unless they contravene some rule of law. This doctrine is so elementary and familiar that we do not pause to cite authorities.

Taking the will and codicils, and considering them as a whole, as we must, the intention of the testator is clearly manifest. That intention tersely and plainly stated is that he intended to divide his estate between his daughter Martha E. Matlock and his granddaughter Mellie Lock; that as to the former he intended that she should take a present interest in the one-half of all his estate, both real and personal, and that the latter should take a contingent or conditional interest in the one-half thereof. In other words, he intended to give to his daughter one-half of his real estate in fee simple and one-half of his personal estate outright, and intended that her right thereto should become absolute upon his death; and he intended to give his granddaughter the remaining half of his real estate in fee simple, and the remaining half of his personal estate, subject to certain "conditions, restrictions and contingencies." Those conditions are clearly and plainly stated by the testator, and are that her absolute right to the property depends upon her living to be forty years old; that she should pay taxes, keep up repairs, and that she should not alien or encumber the real estate. If she does not live to be that old, then all the property devised to her shall vest absolutely in her child or children, if any are living, and if not, then in appellant Martha E. It seems to us that the intention of the

testator is made manifest throughout the will, but, if that can be doubted, the whole is clarified beyond dispute by the last clause in the second codicil, in which he uses this language:

“It being my true intent by this will and codicils that one-half of my estate considering all advancements shall go to Martha E. Matlock, and one-half to Mellie Lock, subject to all conditions, limitations and restrictions as set out in said will and codicils hereto.”

Keeping in mind the rule that in the construction of a will the intention of the testator, if such intention is expressed or made manifest, should control, and holding that the testator in the will before us clearly and unmistakably expressed his intention as to the disposition he desired to make of his estate, the next inquiry which suggests itself is whether the intention here expressed is violative of any established rule of law. If it is not, then it is the plain duty of the court to construe the will in harmony with the intention of the testator, so that the estate he intended to devise to the appellee may vest in her, burdened with the “conditions, limitations and restrictions” imposed. Notwithstanding the clearly expressed intention of the testator, if that intention, and the conditions, limitations and restrictions imposed contravene any rules of law, then they must fall, and the estate devised to the appellee must vest in her in harmony with the law.

The writer is of the opinion that the will gave to the appellee a conditional fee, depending upon her living to be forty years old, and, by the express

2. provisions of the will, if she attains that age the estate is to vest absolutely in her. There are many cases in the reports where our court has had under consideration the construction of wills wherein conditional fees have been devised, and we will refer to some of them in support of our conclusion that the estate the testator intended to devise to appellee was and is a conditional fee.

In the case of *Jones v. Miller* (1859), 13 Ind. 337, the

following provision of a will was under consideration: "I give to Paulina Miller and Alexander Miller, the heirs of Nancy Miller, my daughter, \$1 each. * * * I further direct that if the aforesaid Samuel Stephen, my son, should decease without a lawful heir or heirs, that all that part of my estate, both real and personal, set off for the said Samuel Stephen, my son, shall be divided in equal shares between the aforesaid Paulina Miller and Alexander Miller," etc. By a former provision of the will the testator in that case gave to his son, Samuel Stephen, all of his real and personal estate with certain specific exceptions. Samuel Stephen under the devise made to him entered upon the real estate and sold it to appellants. He afterward died without lawful issue, and it was held that the estate devised to him was a conditional fee, depending upon his having a lawful child or children, and he having died without such issue having been born to him, his estate became divested at his death, and the fee thereupon vested in Paulina Miller and Alexander Miller, and the purchasers from Samuel took nothing by his deed. The court also held in that case that the will was not in conflict with the statute against perpetuities.

In the case of *Smith v. Hunter* (1864), 23 Ind. 580, the will of Samuel D. Hunter was under consideration. By the will he devised to his adopted son, David S. Meriter, certain real estate on the following conditions: (1) That he should live with the widow of the testator and be obedient and kind to her until he should be twenty years of age; (2) that the expenses of his education from the time he should become eighteen until he reached the age of twenty years should be defrayed without expense to the widow, or out of the land devised to him; (3) that, should he die childless, the land should belong to Icopheena Hunter, daughter of the testator, and her heirs. By the will the control of the land devised to Meriter was given to the widow until the devisee arrived at the age of twenty years.

Subsequently the guardian of Meriter sold the land by order of court when he was about sixteen years of age, and afterward he died childless. The action was one in ejectment against the purchasers at the guardian's sale by the heirs of Icophena Hunter, subsequently deceased. In the decision of the case the court said: "That the purchaser at the guardian's sale could take no greater estate in the land than the ward had, is a proposition so clear that it would be scarcely pardonable to dwell upon it. The pertinent inquiry then is, what was the nature of the estate of David S. Meriter in the land in controversy? * * * It is quite evident that during his lifetime he held a fee simple conditional, and dying childless there was a failure of the condition; and by the will the estate went to the heirs of Icophena, by executory devise, a fee being thus limited to take effect after a fee. It would follow, in this state of the case, that the plaintiffs must recover."

In the case of *Shimer v. Mann* (1885), 99 Ind. 190, 50 Am. Rep. 82, it was held that the devise of the rents and profits of lands to a devisee, named in the will, until his youngest child should become of age, and that "upon the happening of which event the fee simple of said lands shall then vest absolutely in said" person "and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interests," vested in such devisee, upon the event of his youngest child reaching the age of twenty-one years, the fee simple of the real estate thus devised.

The language of the court in the decision of that case is so pertinent to the question here involved that we quote the following: "The devise of the income of the land to Samuel B. Mann until the youngest child becomes of age is neither unintelligible, nor is it inconsistent with the theory that the testatrix intended that he should take a fee upon the happening of that event, nor does it even make an unreasonable testamentary disposition of the land. It is perfectly reasonable to presume, what, in truth, the language plainly

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imports, that the testatrix meant to deprive him of the power of disposing of the property so long as his children were unable to make their way in the world, so that he should have means of supporting them that he could not fritter away or lose by speculation or mismanagement. It may be well that she meant that as long as his children were not of age the power of disposition should be fettered, and that as soon as they attained full age he should have complete power over the property to do with it as he chose. Such a scheme of testamentary disposition is quite intelligible and perfectly reasonable, and in this instance entirely consistent with the whole frame and tenor of the will. More apt technical words to vest an estate, ripening into an absolute and unconditional fee upon the happening of a prescribed condition, could not have been chosen, than those adopted, and these words are in harmony with the general scheme evidenced by the whole tenor of the instrument by which the testatrix declared her intention regarding the disposition of her land. * * * It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. This is what the will now before us does. * * * We need not, however, decide the question whether the estate in fee vested absolutely in Samuel B. Mann at the time of the testatrix's death, for, conceding that he took only a conditional fee, still, as the condition upon which the estate was granted had happened, his rights became absolutely vested. If the estate was a conditional fee, it became absolute when the contingency arose which destroyed the force of the condition. 1 Preston, Estates, 476. We think that the devise must be regarded as creating a conditional or limited fee, restricting the right of alienation until the youngest child of the devisee arrives at full age."

In the case of *Boling v. Miller* (1893), 133 Ind. 602, the following provision of a will was construed: "I further

will and direct that at the death of my wife the whole of my estate be divided into three equal shares, and I give and devise one of such shares to my son, George L. Boling, and one share to my daughter, Sarah M. Morris, and one share to my grandson, Clemuel N. Boling, provided he attains the age of twenty-one years. Should my grandson die without issue, then I will and direct that the share he would have received shall be divided equally between George and Sarah, and if either be dead, to go to their descendants according to the laws of descent.' ”

In that case the Supreme Court held that, under the law in this State, land may be devised to a person in fee, to be divested on the failure of certain conditions, and then to vest in other persons. And in deciding the case the court said: “In our opinion, under the well-settled rules which we have stated, the fee vested in the grandson, Clemuel N. Boling, at the death of the testator, subject to be divested in case he did not live until he was twenty-one years of age, and to vest in the son and daughter, or their heirs, in case said Clemuel N. died without issue.”

In the case of *Corey v. Springer* (1894), 138 Ind. 506, the will of Gabriel Springer was presented for construction. Item four of the will was as follows: “‘At the death of my wife, if she shall not marry again, I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be.’ ”

In that case the testator died leaving surviving him his widow, one son and two daughters, as his sole heirs. The son John J. died testate, leaving no wife or issue surviving him, and the question at issue was, what estate John J. had in the land of his deceased father? And the question arose upon the application of the executor of the estate of John J. to sell the real estate to which he might have been

entitled under the will, for the purpose of paying his debts. It was the contention of the appellant that the widow took an estate for life in the lands in controversy, and that the remainder in fee vested in Gabriel Springer's children, one of whom was John J., and further that such remainder in fee vested absolutely and unconditionally in John J. at the time of his father's death. The appellees contended that after carving out a life estate for the widow, it was the manifest intention of the testator to give to his children living at her death, and to the descendants of such as were then dead, a vested remainder; and that the testator appointed a fixed time when the conditional fee should ripen into an absolute fee in his children, and by his will fixed the time for the distribution of his estate at the death of the widow. In the decision of the case the court used this language: "Here the testator, in language as clear and unmistakable as could be employed, fixes the time for 'such distribution' or final disposition to occur, viz., 'at the death of his widow.' Until this event shall happen, he holds the fee conditional and in abeyance, subject to alteration, and only to ripen and fasten absolutely in his children surviving at the death of his unmarried widow. Appellant's counsel state the rule correctly, that the law favors vested estates, and remainders will never be held to be contingent when they can consistently, with the intention of the testator, be held to be vested. Words of survivorship, generally, in the absence of an expressed or implied intention to the contrary, are construed to refer to the testator's death. *Boling v. Miller* [1893], 133 Ind. 602; *Davidson v. Bates* [1887], 111 Ind. 391; *Harris v. Carpenter* [1887], 109 Ind. 540; *Davidson v. Koehler* [1881], 76 Ind. 398. * * * But the converse is true, that where there is an expressed or fairly implied intention to the contrary, the law will carry into effect the evident purpose of the testator. And where the testator fixes the time, by expressed or fairly implied intention, for the distribution of his estate to his children,

at the death of his widow, the law will uphold its purpose and intention. *Wood v. Robertson* [1888], 113 Ind. 323. A conditional fee may be created by will as well as by a deed. It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. *Shimer v. Mann* [1885], 99 Ind. 190, 50 Am. Rep. 82. It is evident, in this case, that John J. Springer, by the terms of the will, took a conditional fee; that his estate in expectancy was to enlarge and ripen into an absolute fee at the death of the widow; that he having died prior to that event his estate was a defeasible one, which has been defeated, and there remains no interest which the appellant, as executor, can seize upon or sell by the order of the court to pay his debts. A will ought to be so construed as to give effect to all its provisions, and make it a harmonious whole."

In the more recent case of *Tindall v. Miller* (1896), 143 Ind. 337, the will provided that the testator's wife should have certain property "so long as she may live, * * * and at the death of my wife the above described property shall pass absolute to my daughter Julia, if she still survives. If she should be deceased, it is my desire that the property pass to her heirs."

In that case it was held that the devise in dispute was a vested remainder to Julia, the enjoyment of which was postponed to her or her heirs until the death of her mother. The court used the following language: "We do not question that if the fair meaning of a will fixes upon a definite future event as determining the time when title shall pass, then a remainder so devised will be conditional upon the happening of such event. The intention of the testator, however, so to devise his property must be clear."

The case of *Moore v. Gary* (1897), 149 Ind. 51, is also in point. The question in that case involved the construction of items six and seven of the will of Mahlon Brown,

which are as follows: "Item Sixth. At the death of my wife, or at my decease, if I should survive my said wife, I give, grant, devise, and bequeath all the remaining portion of my personal property, including money on hand, or outstanding, and all my real estate of every kind and nature whatever, to said John C. Wells and to his heirs, being his own children, forever. Item Seventh. I further direct that if said John C. Wells shall die without issue, that is without heirs, being his own children, lawfully begotten, living at the time of his death, or if said John C. Wells shall die before my said wife, and she should survive me, then at her death, or if I should survive both my wife and said John C. Wells, then at my death, my estate, or the remaining part thereof, shall be reduced to money by the sale of the real and personal property other than money, and the same, when so reduced to money, shall be divided into three equal parts, and I devise and bestow the same as follows, viz."

The appellees claimed that John C. Wells took an estate in fee under item six of the will, and that the devise over in item seven was void. The trial court took that view of the law, and rendered judgment for appellees, who claimed under Wells. It was held that the law not only favors the vesting of remainders, but also presumes that the words postponing the enjoyment of the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of such an estate, citing *Moore v. Hare* (1896), 144 Ind. 573. In the opinion the court used the following language: "It is contended by appellees that under the law as declared by this court in *Fowler v. Duhme* [1896], 143 Ind. 248, and *Moore v. Hare* [1896], 144 Ind. 573, said clause of item seven refers to the death of John C. Wells in the lifetime of the testator. The rule is, that where real estate is devised in fee simple to one, with a devise over, if the first taker should die without issue living at the time of his death, the words refer to a death without issue during

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the lifetime of the testator, unless there is an expressed or implied intention to the contrary. *Fowler v. Duhme*, *supra*, and cases cited; *Moore v. Hare*, *supra*, and cases cited; * * * *Heilman v. Heilman* [1891], 129 Ind. 59. * * * It is a canon of interpretation that no word or clause in a will is to be rejected to which a reasonable effect can be given, and that effect must be given to every part of a will if possible. It is clear, we think, that the words in the first clause in said item, being the first condition stated, referred to the death of Wells after the death of both the testator and his widow, because by the two following clauses the testator provided for the death of Wells before the death of the widow, and before the death of the testator. The words in said item refer, therefore, to the death of Wells after, as well as before, the death of the testator. For this reason the case in hand does not fall within the rule declared in *Fowler v. Duhme*, *supra*, and cases of that class."

In that case Wells died after the testator and his widow, without living issue, and it was finally held that the devise over took effect at that time, and that the same was valid. It followed that the judgment was reversed, and that under the seventh item of Brown's will the administrator was authorized to convert the estate into cash, and divide the proceeds, as directed by subsequent provisions of the will.

The same rule as declared by the authorities cited prevails in other jurisdictions, as exemplified by the following cases: *Gannon v. Peterson* (1901), 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Keepers v. Fidelity Title, etc., Co.* (1893), 56 N. J. L. 302, 28 Atl. 585, 44 Am. St. 397, 23 L. R. A. 184; *Buck v. Paine* (1884), 75 Me. 582; *Bowman v. Long* (1857), 23 Ga. 242; *Stuart v. Walker* (1881), 72 Me. 145, 39 Am. Rep. 311; *Hooper v. Bradbury* (1882), 133 Mass. 303.

In *Buck v. Paine*, *supra*, the testator, Rich, devised his estate to trustees, to hold the estate in trust for the benefit of

his grandchildren. This trust was to continue three years, and then the estate was to be divided equally among the devisees. The will provided that if either of the devisees died before the trust should cease, his or her legal heirs should be substituted in place of the deceased. One of the devisees died before the period fixed for the trust to cease, having disposed of her estate by will. The question presented was, what, if anything, did her husband and others named in the will take? The supreme court of Maine held that they took nothing, and in the course of the decision said: "Here the complainant's wife took an equitable fee, and by her death during the three years named in the will, the estate went over to her heirs as an executory devise. When an estate is devised in fee, with a devise of it over upon the happening of a certain event, the first devisee takes an estate in fee simple conditional, and the devise over takes effect as an executory devise. *Fisk v. Keene* [1853], 35 Me. 349; 2 Redfield, Wills, 645. Roper calls the estate received by the first taker, 'an estate vesting *sub modo*, a species of conditional legacy or devise, subject to be divested on the happening of the contingency on which it is given.' 1 Roper, Legacies, *601. The words of the will clearly enough create a conditional devise only. No particular or set of technical words are necessary to create a condition. A common-sense construction of the words govern. The expressive word here, the word 'if,' is quite commonly employed to express a condition. The words 'shall be substituted' have an unmistakable meaning in their place. It would be a perversion of the common meaning of common words to deny the testator's intention to create a conditional fee. The books abound with cases that are in principle like the case at bar, showing that the happening of the subsequent condition defeats the precedent estate, although a vested estate. *Richardson v. Noyes* [1806], 2 Mass. 56, 3 Am. Dec. 24; *Brightman v. Brightman* [1868], 100 Mass. 238; 1 Roper, Legacies, *766, and

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cases cited; 1 Roper, Legacies, *601, and cases; 1 Jarman, Wills, *848, *864."

In *Bowman v. Long, supra*, a devise by codicil was made "to my grandson, William Henry Long, only surviving child of my late daughter, Lucy A. Long, the property that I gave to Lucy A. Long and her children in my will above referred to, should he live to be twenty-one years of age, but should my said grandson die before he arrives at twenty-one years of age, then said property I give to my other lawful heirs." It was held that the legacy to the grandson vested at the death of the testator, subject to being divested should he die before reaching the age of twenty-one years. See, also, *Clark v. Benton* (1899), 124 N. C. 200, 32 S. E. 556; *Roome v. Phillips* (1862), 24 N. Y. 463; 29 Am. and Eng. Ency. Law, 451, and cases cited.

As appears from the authorities cited, there is a uniform line of decisions supporting the right of a testator to dispose of property in the manner employed by Elisha King, in his will, here in controversy. It is seldom, if ever, that the same language is used in two different wills, but that employed bestows the same estate, and is subject to the same construction.

A leading case relied upon to support the conclusion of the trial court is that of *Fowler v. Duhme* (1896), 143 Ind. 248, in which the court held that under the language employed the estate vested in Mrs. Duhme and Moses Fowler Chase was a fee simple absolute, and therefore that case is not of controlling influence here, for this case does not belong to that class of cases.

The rule as declared in *Moore v. Gary* (1897), 149 Ind. 51, is, that where real estate is devised in fee simple to one, with a devise over if the first taker should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, unless there is an express or implied intention to the contrary.

See, also, *Fowler v. Duhme*, *supra*; *Heilman v. Heilman*, *supra*. The will in this case presents no such a condition.

It is urged by the learned counsel that the provisions of the will against alienation, etc., until appellee should arrive at the age of forty years, are repugnant to our

3. statute. §3382 Burns 1901, §2962 R. S. 1881.

This statute provides that "the absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, devised and therein specified," etc. We do not think the will violates any provision of the statute, for it does not suspend the alienation beyond the life or "any number of lives" in being when the estate was created. When this will and the codicils were executed, appellee was in being, and when the will became operative the power of alienation was suspended for about twelve years, as the facts specially found show, at which time she would arrive at the age of forty years. No attempt is made to suspend the power of alienation beyond the life of any one in being.

The inhibition in the will against alienation is definitely fixed. One of two events was sure to occur, viz, appellee would live until she arrived at the age of forty years, or die before that period. In the latter event, if she left surviving her a child or children, the estate devised to her should go to her child or children, or if she died before arriving at the age of forty years, without issue, then to Martha E. Matlock.

As a test whether the provisions of the will are repugnant to the statute against perpetuities, it is pertinent to inquire what rights appellee's child or children would have if she should, for a valuable consideration, sell and convey, to a third party, all the real estate devised to her, and die before

arriving at the age of forty years, leaving such child or children. Under the authorities cited, there is no question but that they would be entitled to recover the estate, if they should timely assert their rights. The question now under consideration is, it seems to us, put at rest by the decisions of our own court.

In the case of *Conger v. Lowe* (1890), 124 Ind. 368, 9 L. R. A. 165, the testator gave to his son certain real estate during his natural life, conditioned that he live upon and occupy it, and upon his refusal to do so it was to go to his lawful heirs. He did live upon it for a time and sold and conveyed it by deed. His children brought an action to recover the property, because their father had not complied with the conditions imposed. In the decision of the case, the Supreme Court, by Mitchell, J., said: "Where, however, an estate for life, or years, is created, with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate are valid and maintainable upon reason and authority. Even estates in fee simple may be subjected to valued limitations over, and be made defeasible or subject to forfeiture upon condition that the grantee or devisee uses, or fails to use, the estates in a particular way, or for a particular purpose, or conveys it to a certain person, or to any person whatever, or allows it to be sold on execution, or to become encumbered, or the like. Where a precedent estate is made defeasible upon the happening of a certain event, which event also marks the taking effect in possession of a valid limitation over, the happening of that event puts an end to the precedent estate, and gives the right of possession to the person in whom the remainder or reversion is vested. The foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in some one a valid remainder or reversion, whose estate in possession is contingent upon

some event, which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use. *Harmon v. Brown* [1877], 58 Ind. 207; *O'Harrow v. Whitney* [1882], 85 Ind. 140; *Mandlebaum v. McDonell* [1874], 29 Mich. 78, 18 Am. Rep. 61; *De Peyster v. Michael* [1852], 6 N. Y. 467, 57 Am. Dec. 470."

The Supreme Court of the United States in *Nichols v. Eaton* (1875), 91 U. S. 716, 23 L. Ed. 254, said: "Nor do we see any reason, in the recognized nature and terms of property and its transfer by will, why a testator who gives, without pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self protection, should not be permitted to do so, is not readily perceived."

In *Shimer v. Mann* (1885), 99 Ind. 190, 50 Am. Rep. 82, the court said: "In the devise contained in the will before us, the condition is one restraining the power of alienation until a definite and specified time. Conditions like the one written in this will are effective, for they do not unreasonably restrict the power of alienation."

In *Langdon v. Ingram* (1867), 28 Ind. 360, it was said: "As a general rule, a condition in a grant or devise that the grantee or devisee shall not alienate is void, because repugnant to the estate, but a condition that a grantee or devisee shall not alienate for a particular time, or to a particular person or persons, is good."

But there is another reason why the judgment must be reversed. By its decree the trial court declared that, upon the settlement of the estate of the testator, appellee

4. was entitled to receive her portion of the personal estate absolutely, without any restrictions. The

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testator, by his will, created an express trust, appointed a trustee thereunder, and directed what should be done with certain of the personal estate devised to appellee. The trustee was directed to manage and control such personal estate until appellee should arrive at the age of forty years, and when that period should arrive to turn it over to her, without any restrictions. The restrictions placed upon the personal estate are not violative of any statute or rule of law. Section 8133 Burns 1901, §6057 R. S. 1881, provides: "No limitation or condition shall suspend the absolute ownership of personal property longer than the termination of lives in being at the time of the execution of the instrument containing such limitation or condition, or, if in a will, of lives in being at the death of the testator."

In the case of *Board, etc., v. Dinwiddie* (1894), 139 Ind. 128, it was held that a permanent investment of funds, with directions to use the income for a designated purpose, did not violate the statute.

In *Dyson v. Repp* (1868), 29 Ind. 482, it was held that a will directing money to be put at interest, and to be paid to legatees, as they became of age, was a valid provision, and would be upheld.

The decree of the court directing that all of the personal estate devised to appellee be at once, upon the settlement of the estate, turned over to her was erroneous. These considerations lead us to the conclusion that the provisions of the will affecting the rights of appellee are not at variance with any rule of law, and, as they clearly express the testator's intention, it is the duty of the court to see that they are given effect.

The judgment is reversed, and the court below is directed to restate its conclusions of law, in harmony with this opinion, and render judgment accordingly.

COMSTOCK, C. J.—I concur in the conclusion reached, but am of the opinion that the estate devised to Mellie E. Lock is a determinable fee.

ROBY, J.—“A conditional fee is one which restrains the fee to some particular heir to the exclusion of others.” 2 Blackstone’s Comm. (Cooley’s ed.), *110; 4 Kent’s Comm. (14th ed.), *11.

The estate devised to Mellie Lock was a fee. It may be of perpetual duration. 1 Washburn, Real Prop. (6th ed.), §162. It is liable to be determined by an event expressed in the instrument creating it, and is therefore a determinable fee. 1 Washburn, Real Prop. (6th ed.), §§164-172; 2 Blackstone’s Comm. (Cooley’s ed.), *109; 4 Kent’s Comm. (14th ed.), *9; *Pulse v. Osborn* (1903), 30 Ind. App. 631.

The estate of Mellie Lock is subject to a conditional limitation, dependent upon her death before she arrives at the age of forty years. 1 Washburn, Real Prop. (6th ed.), §165.

I do not understand that the statute against perpetuities (§3382 Burns 1901, §2962 R. S. 1881) is applicable to the provisions of this will. I therefore concur in the reversal of the judgment, placing my concurrence exclusively upon the propositions above stated.

GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN v. BARWE.

[No. 5,432. Filed November 17, 1905. Rehearing denied February 15, 1906. Transfer denied June 8, 1906.]

1. APPEAL AND ERROR.—*Weighing Evidence*.—The Appellate Court will not weigh conflicting evidence. p. 310.
2. PLEADING.—*Complaint*.—*Review of Judgment*.—A complaint to review a judgment for the reason that the complaint upon which such judgment was founded was insufficient, is unsupported where such original complaint stated a valid cause of action. p. 310.
3. SAME.—*Complaint*.—*Insurance*.—*Mutual Benefit*.—*Beneficiaries*.—A complaint showing that plaintiff is the beneficiary of a benefit life certificate in defendant insurance order; that his

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father was a member thereof and performed all conditions to be performed and that plaintiff performed all conditions to be by him performed, states a cause of action. p. 310.

4. **INSURANCE.—Mutual Benefit.—Certificates.—Promises to Pay Money.**—A mutual benefit certificate granting the holder the right to designate a beneficiary to whom the sum stated, at the holder's death, shall be paid, is a promise to pay money to the beneficiary properly designated. p. 311.

From Vanderburgh Circuit Court; *Louis O. Rasch*, Judge.

Suit by the Grand Lodge, Ancient Order of United Workmen of Indiana, against John H. Barwe. From a decree for defendant, plaintiff appeals. *Affirmed*.

Charles L. Wedding, Ireland & Reister and *Charles B. Harris*, for appellant.

A. D. Jones, G. K. Denton and *George A. Cunningham*, for appellee.

COMSTOCK, J.—Appellant brought suit against appellee to vacate and set aside a judgment rendered in the Vanderburgh Circuit Court in 1902 against appellant for \$2,200 in round numbers. The complaint is in two paragraphs. In the first the vacation is sought (1) on the ground that the judgment involved the same questions of fact as the case of *Marshall* against this appellant, rendered by the same court, and which was afterwards appealed to the Appellate Court, and by said court reversed (*Grand Lodge, etc., v. Marshall* [1903], 31 Ind. App. 534), it being agreed as alleged that the decision in the *Marshall* case should control the judgment in the *Barwe* case, and, that judgment having been reversed, appellant was entitled to have the *Barwe* judgment vacated; and (2) because it was wrong and unjust.

The second paragraph asked a review of the judgment for the reason that the complaint in the original action was insufficient.

A general denial was filed to each paragraph. The court found for appellee. Appellant relies for reversal upon the following errors: (1) The court erred in overruling appellant's motion for a new trial; (2) the decision of the court was against the weight of the evidence; (3) the court found for the defendant appellee on the second paragraph of complaint to review the judgment.

As to the claim based upon the first paragraph there is a conflict of evidence as to the alleged agreement.

1. We are called upon to weigh the evidence. This we cannot do. *Smith v. Smith* (1905), 35 Ind. App. 610, and cases cited.

In support of the second paragraph, it is contended that the original complaint is insufficient because it does not allege any consideration for the issuing of the cer-

2. tificate. Appellee insists that the sufficiency of the paragraph is not presented, because it is not shown that the demurrer to the complaint in the original action was for want of facts. Cases are cited in support of this position; but, without reference to the form of the demurrer, if in the original action the complaint states a valid cause of action the second paragraph of the complaint under consideration is without support.

The complaint in said original action in substance alleges that on October 19, 1903, Joseph Barwe was received in said association as a member therein, and at the time he

3. was so received the defendant executed and delivered to him a certain membership certificate bearing date on said day, whereby said defendant undertook and promised to pay to this plaintiff at the death of said member the sum of \$2,000, a copy of which certificate is filed herewith and marked exhibit A, and made a part hereof; that on November 22, 1900, said Joseph Barwe died; that this plaintiff was the father of said Barwe, had a valuable interest in his life, both at the time said certificate was ex-

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cuted and delivered to said member and at the time of his death; that said Joseph Barwe has performed all the conditions of said certificate and contract of insurance required by him to be performed, and this plaintiff has performed all of the conditions of said certificate and contract of insurance on his part to be performed, and that he is still owner and holder of said certificate; that the defendant has not paid said sum or any part, and has refused and still refuses to pay the same; that the same is now due and has been since November 22, 1900, etc. These allegations are sufficient to withstand a demurrer for want of facts. *Supreme Lodge, etc., v. Knight* (1889), 117 Ind. 489, 3 L. R. A. 409; *People's Mut. Benefit Soc. v. McKay* (1895), 141 Ind. 415.

Counsel for appellant admit that *Supreme Lodge, etc., v. Knight, supra*, supports the proposition that contracts of insurance, "such as in this case, are written promises to

4. pay money," but say that in that case the policy contained an agreement to pay the appellee the sum of \$2,000 upon the death of the assured, while the certificate in this case contains no such promise, but only certifies that the member is entitled "to designate the beneficiary to whom the sum of \$2,000 of the beneficiary fund of the order shall at his death be paid;" and that this is an important distinction in the two certificates. We see no difference in the agreement to pay the specified sum to the party named in the certificate as beneficiary, and to pay a person designated by the member of the society. In the certificate before us the member designates as "beneficiary, under the terms hereof, J. H. Barwe, bearing to him the relation of father." The case of *Supreme Lodge, etc., v. Knight, supra*, is decisive of this branch of the case.

Judgment affirmed.

AETNA LIFE INSURANCE COMPANY ET AL.

v. STRYKER.

[No. 5,171. Filed April 4, 1905. *Certiorari* denied January 31, 1906. Rehearing denied June 19, 1906.]

1. TRIAL.—*Special Findings.—General.*—Where a special finding of facts is asked and furnished, a general finding given in connection therewith will be disregarded. p. 321.
2. SAME.—*Complaint.—Special Findings.—When Same Questions Presented.*—Where the special findings contain the same facts as alleged in the pleadings, a decision on such findings renders useless a decision on such pleadings. pp. 321, 328.
3. VENDOR AND PURCHASER.—*Defective Title.—Notice.—Lis Pendens Record.*—Defendant, purchasing lands while a *lis pendens* notice was filed questioning the title thereto, is not an innocent purchaser, but takes such title burdened with the equities. pp. 321, 328.
4. SAME.—*Defective Title.—Lis Pendens Notice.—Dismissal of Suit.*—The subsequent dismissal by plaintiff of his suit in which he had filed a *lis pendens* notice does not constitute defendant an innocent purchaser of the lands in question, where he bought such lands during the pendency of such notice and suit. p. 322.
5. DEEDS.—*Void.—Disaffirmance.*—A void deed needs no disaffirmance. pp. 324, 328.
6. TRIAL.—*Special Findings.—Failure to Find Fact in Defense.—Effect.*—A failure by the court to find a fact alleged as a defense is a finding against defendant on such issue. p. 325.
7. APPEAL AND ERROR.—*Rehearing.—Certiorari.*—A writ of *certiorari* will not be issued to correct the record after decision, for the purpose of a petition for a rehearing. p. 326.
8. SAME.—*Writ of Certiorari.—Purpose.*—Appeals are prosecuted in this State under the provisions of the code and not by writ of *certiorari*. p. 326.
9. SAME.—*Certiorari.—Title.—New Trial as of Right.—Rehearing.*—Where, pending an appeal, the defendants, in a suit to quiet title, file their motion for a new trial as of right, in the trial court, which motion is overruled, defendants cannot, after a decision on appeal of the former case, have the record of the overruling of such motion brought up by a writ of *certiorari* and have such overruling considered on a petition for a rehearing in the former case, such ruling being appealable independently. p. 327.

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10. **APPEAL AND ERROR.**—*Theory of Suit.*—*Record.*—*Evidence.*—*Briefs.*—The Appellate Court in ascertaining the theory of the complaint may consider the entire record, the evidence and the briefs of counsel. p. 327.
11. **PLEADING.**—*Complaint.*—*Foreclosure of Mortgages.*—*Suit to Redeem.*—*Offer to Pay.*—Where the mortgagee purchased plaintiff's lands under the decree foreclosing its mortgage and it and its grantee have had the rents and profits therefrom for several years, it is not necessary for plaintiff, in a suit to redeem, to offer to pay such mortgage, his offer to pay the amount found to be due upon an accounting between the parties being sufficient. p. 328.
12. **JUDGMENT.**—*Foreclosure.*—*Mortgagor Not Party.*—*Effect.*—A decree of foreclosure to which the mortgagor, who was claiming title to the land, was not made a party is a nullity as to him, and does not divest his rights in the land. p. 329.
13. **SAME.**—*Personal.*—*Parties.*—A personal judgment against the mortgagor in a foreclosure suit wherein he was not made a party is void. p. 329.
14. **VENDOR AND PURCHASER.**—*Title.*—*Defects.*—*Purchase Pendente Lite.*—A purchaser *pendente lite* takes the title to the lands purchased burdened with the defects. p. 330.
15. **DEEDS.**—*Quitclaim.*—*Warranty.*—*Notice.*—A quitclaim deed is, but a warranty deed is not, notice to the purchaser sufficient to put him on inquiry as to defects in the title. p. 331.
16. **TRIAL.**—*Special Findings.*—*Failure to Find Fact.*—*Presumption.*—*Deeds.*—*Quitclaim.*—A failure to find the character of a deed relied upon by the defense raises the presumption that such deed was a quitclaim, where the result required such finding, all reasonable presumptions being indulged to uphold the action of the trial court. p. 332.
17. **MORTGAGES.**—*Foreclosure.*—*Redemption.*—A mortgagor, not made a party to a foreclosure, may redeem from such foreclosure after the execution of the sheriff's deed, though he knew of such foreclosure before the execution of such deed. p. 332.
18. **SAME.**—*Suit for Redemption.*—*Taxes.*—*Rents.*—*Improvements.*—*Right to an Accounting.*—A redemptioner has the right in his suit to redeem to have an accounting taken of the taxes, rents and improvements. p. 333.
19. **APPEAL AND ERROR.**—*Rehearing.*—*New Questions.*—Questions not raised before the decision of a case cannot be raised on a petition for a rehearing. p. 333.

From Pulaski Circuit Court; *Timothy E. Howard*, Special Judge.

Suit by Jacob Stryker against the Aetna Life Insurance Company and others. From a decree for plaintiff, defendants appeal. *Affirmed*.

Henry A. Steis and *Henry C. Pettit*, for appellants.

Burson & Burson, for appellee.

MYERS, J.—On January 26, 1897, appellee began this suit in the Starke Circuit Court against appellant James L. Alvey, also Anna Alvey, John Zurn and Barbara Zurn, by complaint in one paragraph in the ordinary statutory form, seeking to recover the possession of 335 acres of land in Starke county, and for damages. To this complaint such proceedings were had that on March 17, 1897, defendants answered by general denial.

On October 24, 1898, appellee by leave of court filed an additional or second paragraph of complaint, making James L. Alvey and the Aetna Life Insurance Company defendants. By this paragraph he sought to quiet his title to 335 acres of land in Starke county as against all the defendants. He asked that an accounting be had of the rents and profits of said land while in the hands of the defendants, and that he be allowed to redeem from the sale of said land made by the sheriff, by paying said defendants or either of them, as the court may determine, such sum as the court may find to be due, if any, after deducting the reasonable value of the rents and profits received by the defendants or either of them, and that he have judgment, and be awarded possession of said premises, and that the defendant Alvey be ejected therefrom, and for all other relief, etc. On December 5, 1899, appellee filed a supplemental complaint demanding that upon the determination of this cause of action an accounting be had, and that defendants be required to account for the rental value of the

land from the commencement of this action and up to the trial of the cause, which sum to be deducted from any sum that may be found to be unpaid on the note and mortgage described in the complaint, and that the court ascertain the equities of the parties and make such order and decree as may be equitable, etc. Such proceedings were had that the venue of this action was changed to the Pulaski Circuit Court, where the cause was put at issue and tried by the court without the intervention of a jury.

The court, at the request of the parties to make special findings and state conclusions of law thereon, on October 1, 1902, submitted and filed special findings and conclusions of law, in substance as follows: (1) On April 5, 1888, appellee was the owner in fee simple and in the peaceable possession of the land described in this complaint (giving a particular description of the land). (2) On said April 5, 1888, appellee borrowed from appellant Aetna Life Insurance Company the sum of \$3,000, for which he executed his note, together with certain interest coupon notes payable to said company, the principal note to become due five years from date, and to secure the payment of said note and coupons appellee executed his mortgage upon the land described in his complaint, which mortgage provided that upon default in the payment of any interest when due the whole debt might be declared due and the mortgage at once foreclosed. (3) On August 23, 1889, appellee by deed conveyed said land to Brayton V. B. Skinner, which deed was recorded in the recorder's office of Starke county, Indiana, October 4, 1889, and said Skinner on February 28, 1890, conveyed said land to Stephen A. Valentine and wife, Anna, which deed was duly recorded April 22, 1890. On November 17, 1892, appellee brought a suit in the Starke Circuit Court against said Valentine and Skinner et al., including appellant Aetna Life Insurance Company, to quiet the title to said land. At the time

of filing his complaint in said suit he also filed with the clerk of said court a *lis pendens* notice of the filing of said complaint, and of his claim of title to said real estate, which notice was duly recorded by said clerk. On February 4, 1896, appellee dismissed said suit as to appellant insurance company, and on February 4, 1896, in the Fulton Circuit Court, to which said cause was taken on change of venue, found "that the plaintiff's title to all of said land should be forever quieted and set at rest in him, and that the title claimed by said defendants, and each of them, to said land is fraudulent and void, and of no effect whatever either in law or equity;" and by the decree of said court plaintiff's title to all of said real estate was accordingly quieted. (4) On November 5, 1887, in the Starke Circuit Court, Elias W. Green was appointed guardian of the person and estate of appellee, who had been adjudged by said court an habitual drunkard and incapable of managing his estate; on March 14, 1888, by the judgment of said court he was restored to his legal status and said guardian discharged. In the year 1889 appellee, in a proceeding before two justices of the peace of Starke county, was found to be insane, and on November 4 duly committed to the care of the Indiana Hospital for the Insane, from which hospital, by the superintendent thereof, on December 6, 1899, he was discharged "as not insane." On March 29, 1893, on petition filed in the Starke Circuit Court, he was, by the verdict of a jury, found to be "restored to soundness of mind, and capable of managing his own estate;" and thereupon judgment was entered in accordance with the verdict. (5) On August 4, 1891, the appellant insurance company filed its complaint in the Starke Circuit Court against appellee et al., to foreclose its said mortgage, and for judgment against appellee for the amount then due on said debt and for the appointment of a receiver to take charge of said real estate. No summons was served upon appellee or no-

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tice given him of said action, nor did he demur or file any motion, answer or other pleading in said cause, but on October 13, 1891, the court found that appellee was present by counsel, not naming any counsel, and he was "ruled to answer." On October 20, 1891, appellee not having answered, was called and defaulted; and judgment of foreclosure was entered against all of said defendants, with judgment over against appellee and his wife for balance due after sale of land. A receiver was appointed to take charge of the land and collect the rent. On December 19, 1891, said lands were sold under said decree by the sheriff of Starke county to appellant insurance company for \$3,781.35, the amount of the judgment, interest and costs. On December 29, 1892, the sheriff of said county executed to appellant insurance company a sheriff's deed for the land so sold. (6) On October 3, 1893, appellee filed his complaint in the Starke Circuit Court against said insurance company, averring that from a time prior to April 5, 1888, until March 29, 1893, he was a person of unsound mind and incapable of managing his own estate, and that such fact was known to said company. While so insane and confined in the insane asylum said insurance company, in the Starke Circuit Court, foreclosed said mortgage. At the time of said foreclosure he was not a resident of Starke county, nor had he been for a long time before and after the date of filing said foreclosure complaint, and which said company well knew. He had no notice of the filing of said complaint, and the pendency of said action against him, and did not appear thereto either in person or by attorney, and no appearance for him was made. A personal judgment was rendered against him in said action, which is still in full force and effect. Said mortgaged premises were, at the date of filing said complaint and the date of foreclosure, of the value of \$10,000—praying that the judgment and decree of foreclosure against him and the

sheriff's sale and deed thereunder be set aside, and be declared null and void, etc. To the foregoing complaint said company filed its answer setting up said notes and mortgage, averring default in payment of said debt, foreclosure of the mortgage and sale of the real estate, and that said judgment was fully satisfied by said sale; also that on March 14, 1888, plaintiff was in the Starke Circuit Court found to be a person of sound mind, and that at the time the suit was brought to foreclose said mortgage, plaintiff was not the owner of said real estate, having on August 23, 1889, conveyed the same to Brayton V. B. Skinner. Since the purchase of said land on foreclosure, said company has made permanent improvements thereon to the value of \$1,000, and paid taxes and ditch assessments amounting to \$600. To the answer so made the court sustained a demurrer for want of facts, and the company excepted. Thereupon, the court ordered said cause "docketed under the number and in the form of the original case, which is sought to be opened up by said Stryker by this proceeding." "And thereupon the court ordered that the judgment and decree heretofore taken, rendered and entered against him, said Stryker, in said cause No. 3,019 (the foreclosure case mentioned in finding five) be and the same are hereby set aside and held for naught; and said Jacob Stryker is hereby allowed to file answer and make defense to said original complaint. And thereupon the plaintiff, Aetna Life Insurance Company, asked the court for leave to dismiss its suit so far as it concerned said defendant Jacob Stryker; and said Stryker at the time objected to leave to dismiss being granted to said plaintiff, without restoring or offering to restore to him his property, or a part thereof, but the court overruled his said objection, and gave leave to said plaintiff to dismiss its said cause as against said Stryker, and he (Stryker) excepted to the decision of the court, and thereupon said plaintiff by

leave of court, dismissed its said suit to which said Stryker objected and excepted." On October 9, 1894, the court ordered said original foreclosure suit dismissed as to said Stryker. (7) Appellee retained possession of said land either in person or through tenants until said insurance company took possession under its sheriff's deed in March, 1893, and retained possession until March, 1895, when said company conveyed said land by quitclaim to appellant James L. Alvey, who has been in possession thereof continually since that time. (7½) Said Alvey had no acquaintance with appellee nor with said Valentine or Skinner prior to the day he purchased the land from said company. (8) At the time the lands were mortgaged to said company by appellee they were worth \$30 an acre and are now worth \$50 an acre. (9) The reasonable rental value per acre of said land from March, 1893, until the present time was \$1.10 per annum, or \$3,690.06. (10) Since March, 1893, the defendants have made necessary repairs and improvements on said lands amounting in value to \$951, and paid taxes and assessments thereon amounting to \$401.89. (11) The interest to date on the amounts mentioned in finding five, for which said lands were sold at sheriff's sale, amounts to \$3,201.50.

"From the facts so found the court concludes the law to be that the plaintiff, Jacob Stryker, is entitled to redeem the lands mentioned and described in the complaint from the sale made by the sheriff of Starke county, Indiana, as found in finding five of the special findings, by the payment of the amount for which said lands were sold, with eight per cent interest thereon from the date of said sale to this time, together with the amount of taxes paid and costs of improvements made by the defendants while in possession of said lands, less the rental value of the land during such time; and that, subject to the payment of such

balance found due by him, the title of the plaintiff to said lands should be forever quieted."

To each finding of fact and to the conclusions of law the appellants each separately excepted. Thereupon a decree was entered permitting appellee to redeem the land in the complaint described, 120 days being given appellee to pay said sum of money, and upon payment thereof, with six per cent interest, to the clerk, he was given the right to enter and take possession of said lands, and from thence on forever his title to be clear and quieted from all liens and claims of defendants; and on failure to pay said sum of money within the time allowed, etc., said sheriff's deed to appellant insurance company was made permanent, etc.

Before the submission of said cause for trial appellee dismissed this action as to Zurn and Zurn.

The appellants, insurance company and Alvey, each filed separate motions for a new trial, each assigning as causes therefor: (1) The special findings of the court are not supported by sufficient evidence, nor is any one of them; (2) the conclusions of law, stated by the court in the above-entitled cause, are not supported by sufficient evidence, nor is any one of them; (3) the decision of the court is contrary to law; (4) the decision of the court is not sustained by sufficient evidence; (5) the special findings, conclusions of law and decree of the court are not sustained by sufficient evidence, nor is any one of them; (6) the special findings, conclusions of law and decree of the court are contrary to law.

Each of said motions being by the court overruled, exceptions were properly taken by the Aetna Life Insurance Company and James L. Alvey separately, who now prosecute this appeal upon separate assignments of errors. Anna Alvey declined to join in this appeal. This is a term-time appeal. The evidence is in the record.

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The court at the time of filing its special finding of facts and conclusions of law thereon, also made a general

1. finding in favor of appellee. The general finding must be disregarded. *Stephenson v. Boody* (1894), 139 Ind. 60.

The first five errors assigned by appellant insurance company, as also the first three assignments of error by appellant Alvey, seek to question the sufficiency of

2. the complaint in this court, and the ruling of the trial court in overruling the demurrer to the complaint, and the ruling of the court on the demurrer to the second paragraph of reply to the third paragraph of the separate answer of appellant insurance company. The questions thus raised by the foregoing assignments of error are fully presented by the errors assigned as to the conclusions of law on the special findings, and the action of the court in overruling the separate motion of appellant insurance company for a new trial. *Stephenson v. Boody, supra; Indiana, etc., Ins. Co. v. Bender* (1904), 32 Ind. App. 287.

On November 17, 1893, appellee commenced a suit in the Starke Circuit Court against the appellant insurance company and others, to quiet his title to the lands in

3. question, and at the same time filed and caused to be recorded in the clerk's office of said court a *lis pendens* notice, to the effect that he was the owner of said real estate. This suit was not finally disposed of until February 4, 1896. In March, 1895, and while this suit was still pending to quiet title, and in the face of the *lis pendens* notice, appellant Alvey purchased from his coäppellant the lands then claimed by appellee.

In the case of *Wilson v. Hefflin* (1881), 81 Ind. 35, the court said: "Here, however, was notice by a *lis pendens*. Such a notice is equivalent to actual notice."

The facts as they appear in this case were sufficient to charge Alvey with notice, at the time he purchased the land, that appellee was claiming to be the owner thereof, and, if so, he was not an innocent purchaser, and bought at his peril. *Smith v. Schweigerer* (1891), 129 Ind. 363; *Hawes v. Chaille* (1891), 129 Ind. 435.

Appellants contend that the action of appellee in dismissing his suit against the insurance company on February 4, 1896, was a failure to prosecute his claim

4. against the company, as the *lis pendens* notice required him to do in order to make such notice effectual against Alvey. We cannot agree with this contention. Alvey purchased the land in March, 1895, while the suit was pending and while the *lis pendens* notice was in full force and effect. Had Alvey purchased the land after the suit was dismissed, and before the institution of the present suit, a different question would be presented. The question is, did he have notice, either actual or constructive, at the time he made the purchase of appellee's claim of ownership? If so, he cannot shield himself behind the law which affords protection to innocent purchasers. Having determined that he had such notice as would make him a *mala fides* purchaser as to all rights of appellee in the land, he therefore occupied no better position than his coäppellant, and can have no better title than that possessed by his grantee, therefore, what we shall hereafter say as to the questions here involved, apply equally to both appellants. As this case comes to this court, it appears that on April 5, 1888, appellee executed a mortgage to the appellant company covering the land in question; that at that time appellee was the unqualified owner of the land so mortgaged; that, on account of default in some of the stipulations of the mortgage, the appellant company, in the year 1891, foreclosed said mortgage, to which proceedings of foreclosure appellee was not a party.

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The land was sold by the sheriff, as directed by the court in the foreclosure proceedings, to the appellant company. At the time of the sale the record title was in Valentine, a remote grantee of appellee. On November 17, 1892, and before the appellant insurance company received the sheriff's deed on account of its purchase at the foreclosure sale, appellee began a suit against appellant insurance company, and others, to quiet his title to said land, on the ground that he was the owner thereof, and that the title of his grantee was void, and at the same time duly filed a *lis pendens* notice of his claim to the land. The suit thus commenced was prosecuted to final judgment, and by decree and judgment of the Fulton Circuit Court appellee's immediate and remote grantee's title was declared to be fraudulent and void, and the title as against all claims and rights of its grantees fully quieted in appellee. Before submission of said cause for trial appellee dismissed as to appellant insurance company. Appellants have had the use and benefit of said land since March 1, 1893. The leading facts just stated, as found by the court, warrant the conclusions of law as stated by the trial court upon its special findings.

It would hardly be contended, that, if we were entirely to eliminate the foreclosure proceedings, and, instead thereof, base appellants' title on a deed from Valentine, made after notice to appellants, as the facts herein show was given by appellee, it would be sufficient to withstand a suit on the part of appellee to quiet his title against them. Such a holding would be against every principle of equity, and in a measure tend to legalize the taking of one's property without due process of law. In this connection we quote the language used by the court in the case of *Myers v. Cochran* (1868), 29 Ind. 256, as follows: "The appellants could only claim title under the sale, if at all, on the ground that they were *bona fide* purchasers under a

legal judgment and execution, without notice of the payment, or, in other words, innocent purchasers for a valuable consideration. But to constitute them such, it is not sufficient that they bid off the land and paid the purchase money before notice of the previous payment of the judgment; they must also have received the sheriff's deed before such notice. In this respect, it cannot be claimed that a purchaser at sheriff's sale occupies a better position than a purchaser of real estate at private sale. And it is well settled that notice to such a purchaser of an outstanding title in a third person, either legal or equitable, or that his vendor's title is a fraudulent one, at any time before the payment of the purchase money, or the execution of the deed, deprives him of the character of an innocent purchaser and defeats his title."

In *Cornett v. Hough* (1894), 136 Ind. 387, it was held that "a mortgage, even if foreclosed, conveys no title to real estate; the title remains in the mortgagor until the delivery of the sheriff's deed." Citing authorities.

In the case of *Hill v. Swihart* (1897), 148 Ind. 319, the court said: "This certificate did not operate to pass to them any title to the lands, in the absence of the execution of the sheriff's deed thereon, after the expiration of the year allowed by the statute for redemption." Citing authorities.

Appellants contend in support of their motions for a new trial, that it was necessary for appellee to allege and prove a disaffirmance of his deed to Skinner, and as

5. he did not aver in his complaint or prove such disaffirmance, therefore, the court erred in overruling their motions.

Before the commencement of this suit a court of competent jurisdiction had by its judgment declared and decreed the Skinner deed to be absolutely void. By that action certainly appellee disaffirmed the Skinner deed, but under the theory of the complaint in this suit, and upon

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the theory adopted at the trial, and as we see this case, it does not belong to that class of cases referred to by counsel as requiring an affirmative act of disaffirmance of the Skinner deed to be pleaded and proved in order for appellee to make out his case. Appellee was not a party to the proceedings upon which appellants' title is founded. What we have already said in regard to notice as given by appellee applies here, and was a sufficient notice to appellants not to rely on title received through Skinner and Valentine, and was sufficient for the purpose of this case. The appellants by their several answers in this case tendered the issue of their title based upon the fore-

6. closure proceedings and through Skinner and Valentine. The absence of a finding of the court in their favor upon that issue must be considered as a finding against them as to such issue.

It seems to us, after a careful examination of the record in the case at bar, that the merits of this cause have been fairly and impartially tried and determined, and a just and equitable conclusion reached by the trial court. We find no error in the record. Decree affirmed.

ON PETITION TO SUPPLEMENT RECORD.

MYERS, J.—Appellants have filed a petition for a writ of *certiorari*, the purpose being to bring before this court the proceedings had in the court below on the separate motion of each appellant for a new trial as of right. By this petition it is made to appear that after this cause had proceeded to final decree on the merits in the trial court, and after an appeal from that decree, and before decision by this court, and within the time allowed by law therefor, each of the appellants filed in the court below a separate motion for a new trial as of right. These motions were by the trial court overruled and final decree thereon rendered after the decision of this court affirming the decree on the merits. Now, pending the petition for a

rehearing, appellants ask for an order to the clerk of the Pulaski Circuit Court, directing such clerk to certify to this court a transcript of all the proceedings had on the motions for a new trial as of right, such transcript to be supplemental to the one now before the court, and upon which it has rendered an opinion.

The law is well settled in this State that a writ of *certiorari* will not issue for the purpose of aiding a petition for a rehearing, or for the purpose of correcting the

7. record in any manner or form after decision on appeal. *Board, etc., v. Center Tp.* (1886), 105 Ind. 422, 444; *Mansur v. Churchman* (1882), 84 Ind. 573; *Elliott, App. Proc.*, §§208, 219.

In this State a writ of *certiorari* is issued only "to compel any inferior court, board, or officer exercising judicial functions, or other person, to certify to such court a full and complete transcript of the records and proceedings of any such tribunal, board, officer, or person, and the production of any paper, whenever it shall be necessary for the proper determination of any cause or proceeding pending before the appellate court." §680 Burns 1901, §668 R. S. 1881. There is no claim of any diminution of the record now before the court affecting in any way a full determination of this cause upon the merits, and if there were, the time is now past for any correction. The purpose of the writ asked is to bring before the court an independent proceeding, appealable as of right, independent of the questions presented by the record now here. *Atkinson v. Williams* (1898), 151 Ind. 431.

In this State appeals are prosecuted to appellate tribunals in the manner provided by our code, and not by writ of *certiorari*. Questions are presented by a specific

8. assignment of errors relied upon, to be entered on the transcript. Therefore, the granting of the petition and the filing of such supplemental transcript would not present anything for our decision, in the absence

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of an assignment of error calling in question the character of the action.

The right of appellants to file their motions for a new trial as of right is given by statute (§1076 Burns 1901, §1064 R. S. 1881) and, when such motions are

9. timely filed, the court's delay in ruling thereon can in nowise affect their right to have the same reviewed on appeal (*Rodman v. Reynolds* [1888], 114 Ind. 148); but, after decision of the questions arising upon alleged errors occurring during or prior to the trial or in the rendition of the judgment by an appellate tribunal, we are of the opinion that the complaining party has no right to supplement the original record by new matter. *Iowa City v. Johnson County* (1896), 99 Iowa 513, 68 N. W. 815; *Wright v. Terry* (1881), 24 Hun 228. In view of our conclusion, the petition must be denied.

Roby, C. J., Black, P. J., and Wiley, J.; concur. Robinson, J., dissents. Comstock, J., absent.

ON PETITION FOR REHEARING.

MYERS, J.—Appellants have filed a petition for a rehearing, assigning many reasons therefor, and supporting the same by a vigorous brief.

In view of their apparent earnestness in this matter, we have again taken the time thoroughly to consider the record and arguments of counsel. From this investi-

10. gation we are led to believe that appellants' trouble comes from a mistaken idea of the theory of this suit. They admit they "were misled to directing a defense of a complaint to quiet title upon the ground of undue, fraudulent practices upon appellee during mental incapacity, whereby he was prevented from a hearing in court on the foreclosure suit." The complaint does contain a number of averments relative to appellee's mental condition prior to and about the time the foreclosure proceedings were had. What may have been the pleader's object in

pleading these facts is not clear, unless it was for the purpose of showing an excuse for not sooner offering to redeem, but these facts are not the leading and controlling facts in the pleading, and upon an examination of the whole record, evidence and briefs of counsel (*Carmel, etc., Improv. Co. v. Small* [1898], 150 Ind. 427, 435) it is apparent that the cause was tried upon the theory of an equitable proceeding to redeem the land from the foreclosure sale, as well as to quiet the title thereto.

Appellants' petition is largely predicated upon the fact that we did not, in our original opinion, take up each pleading separately and pass on it. There is no

2. reason for extending the opinion for such purpose, where the special findings exhibit the same facts as those found in the pleadings, and error is assigned on an exception to the conclusions of law. *Ray v. Baker* (1905), 165 Ind. 74; *Ross v. Van Natta* (1905), 164 Ind. 557.

A reference to our former opinion will show that the particular defects in the complaint most earnestly insisted

upon by appellants, namely, failure to aver dis-

3. affirmance by appellee of his deed to Skinner, and facts showing that Alvey was not a good-faith pur-

5. chaser, are therein referred to and decided, and upon a reëxamination of these questions we find no

reason to change our former conclusion.

Appellants also insist that the complaint is not sufficient to withstand a demurrer for want of facts, as a complaint for equitable redemption, because there is no aver-

11. ment of a tender or offer to pay the amount of the insurance company's judgment, together with interest thereon. While the complaint contains no direct averment of this fact, yet the facts averred show an excuse for not offering to pay the sum then due by averring facts showing that appellant insurance company is holding certain credits to which appellee is entitled, in reduction of the amount due to redeem, which can only be determined

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upon an accounting, which is prayed, and that he "be allowed to redeem from the sale, as aforesaid, made by the sheriff by paying said defendants, or either of them, as the court may determine, such sum as the court may find to be due."

In our opinion, the facts pleaded are sufficient to bring the case within the equitable doctrine, that where a lien holder has credits in his hands which should be applied to the discharge of the lien, it is not necessary to aver in a complaint for an equitable redemption a tender of the amount fixed by the lien, or an offer to pay that amount, but an offer to pay whatever sum shall be found due upon taking the account. *Kemp v. Mitchell* (1871), 36 Ind. 249, 255, and cases cited; *Horn v. Indianapolis Nat. Bank* (1890), 125 Ind. 381, 9 L. R. A. 676, 21 Am. St. 231; *Coombs v. Carr* (1876), 55 Ind. 303, 309; *Nesbit v. Hanway* (1882), 87 Ind. 400.

Appellee was the mortgagor and was claiming to be the owner of the land, and that his deed to Skinner had been procured by fraud and without consideration. Ap-

12. pellant insurance company had notice of these claims upon the part of appellee while it was still a lien holder. These claims it could have put at rest by a suit to foreclose appellee's equity of redemption. *Curtis v. Gooding* (1884), 99 Ind. 45, 48. This it did not do, and as appellee was not a party to the foreclosure proceedings, such proceedings as to him were a nullity. *Watts v. Julian* (1890), 122 Ind. 124; *Petry v. Ambroscher* (1885), 100 Ind. 510; *Curtis v. Gooding, supra*; *Scates v. King* (1883), 110 Ill. 456; *Gage v. Brewster* (1865), 31 N. Y. 218.

But appellants say that because appellee conveyed the land to Skinner prior to the beginning of the proceeding to foreclose its mortgage, he was therefore not a neces-

13. sary party. As a general proposition, this statement is correct, where the mortgagee is simply insisting upon the benefit of his lien; but where a personal

judgment is sought against the mortgagor or grantor, as was done in that case, "then he must be made a party to the action in order to obtain a judgment against him, bar his equity of redemption or foreclose his rights" (*Petry v. Ambrosher, supra*), and in any event was a proper party, and the better practice required that he be made a party. *Curtis v. Gooding, supra*. The exception to the general rule in this regard is well illustrated in the case at bar, as future developments proved the truth of appellee's contention, and therefore the controversy arising upon such a state of facts is properly submitted to a court of equity, that the interest of the parties may be considered and determined purely from merit, freed from formality, to the end that neither shall have an unconscionable advantage of the other.

We find no reason for changing our former opinion as to the effect of the *lis pendens* notice. The doctrine of such notice originated in equity, and is recognized as an

14. important factor in determining property rights.

Being wholly equitable in character, its application must be made along the line of equitable principles, and the maxim, equity regards substance and intent rather than form. Therefore it cannot be said that the advantage of this notice in the furtherance of exact justice shall be rendered ineffectual by technical construction. In speaking of this notice, appellants confidently assert that there is great difference between ownership absolute, as stated in the *lis pendens*, and notice of a right to redeem. This is true, for a right to redeem does not necessarily imply ownership or title, while ownership or title does carry with it, as a matter of law, the right to redeem. It must be admitted that appellant Alvey was a purchaser *pendente lite*, and as such had notice of the then pending suit and of every fact pertinent to that issue.

The character of his deed would also be a material fact in this proceeding. By reference to the special findings it

will be observed that in 1895 appellant insurance company conveyed the land by deed to its coäppellant Alvey. This finding is in accordance with Alvey's answer and the evidence. Therefore, the conveyance being by deed, and the kind of deed not found, we look to our statute, where we find two forms designated—quitclaim and warranty—and, nothing to the contrary appearing, it may be inferred that one or the other of these forms was used. If the first, it served to pass only the present interest of the grantor. §§3343, 3347 Burns 1901, §§2924, 2928 R. S. 1881; *Stephenson v. Boody* (1894), 139 Ind. 60. If the latter, it shall be deemed to convey a fee-simple title with covenants that the grantor "is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all encumbrances, and that he will warrant and defend the title to the same against all lawful claims." §3346 Burns 1901, §2927 R. S. 1881. The force and effect of these deeds as a warning to the purchaser as to the strength or character of title or interest conveyed is widely different. The former is of itself notice to the purchaser that he is accepting a doubtful title, and is sufficient to put him upon inquiry regarding it. *Meikel v. Borders* (1891), 129 Ind. 529, 533; *Steele v. Sioux Valley Bank* (1890), 79 Iowa 339, 44 N. W. 564, 7 L. R. A. 524, 18 Am. St. 370; *Arlington, etc., Elev. Co. v. Yates* (1898), 57 Neb. 286, 77 N. W. 677; *Peters v. Cartier* (1890), 80 Mich. 124, 45 N. W. 73, 20 Am. St. 508; *Condit v. Maxwell* (1898), 142 Mo. 266, 44 S. W. 467; *Smith v. Rudd* (1892), 48 Kan. 296, 29 Pac. 310; *Goddard v. Donaha* (1889), 42 Kan. 754, 22 Pac. 708; *Gest v. Packwood* (1888), 34 Fed. 368; *Clemmons v. Cox* (1896), 114 Ala. 350, 21 South. 426; 2 Pomeroy, Eq. Jurisp. (3d ed.), §753.

While a "title by warranty, for like reason, the form of the latter deed furnishes sufficient assurance to justify confidence that upon inquiry the title" will be found good and

unencumbered. *Rinehardt v. Reifers* (1902), 158 Ind. 675.

Applying the rule that all reasonable presumptions are to be indulged by this court in favor of the proceedings of the trial court (*Campbell v. State* [1897], 148 Ind.

16. 527; *Center School Tp. v. State, ex rel.* [1898], 20 Ind. App. 312), it might be said that the deed in this case, in the absence of a contrary showing, was a quitclaim, and that appellee was entitled to the benefit of this fact in support of his judgment.

As bearing on the question of facts known to the purchaser, or which he might have known by making inquiry, this court in *Toledo, etc., R. Co. v. Fenstermaker* (1892), 3 Ind. App. 151, 154, said: "One can not purchase property where there are facts known to him sufficient to put him on inquiry, and hold it free from prior claims or equities of which due inquiry would have given him information. A party in possession of certain information will be chargeable with knowledge of all facts which an inquiry suggested by such information would have disclosed to him."

Appellee's right to redeem after the year allowed by statute therefor, as we see this case, is beyond question. It might be inferred from appellants' argument that

17. they question this proposition, for in substance they say, if appellee was the owner of the land at the time he filed his *lis pendens*, he has ever since been the owner, and might have redeemed at any time during the year allowed by our statute for redemption. This is true, but if he was not a party to the foreclosure proceeding, and was the owner of the land, or rather the equity of redemption, his right to redeem was not limited to the statutory period. *Jewett v. Tomlinson* (1894), 137 Ind. 326, 329; *Nesbit v. Hanway, supra*; *Hodson v. Treat* (1858), 7 Wis. *263.

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Appellants also bitterly complain of the action of the trial court in taking into account the question of taxes, rents and improvements. They insist that any

18. question in that regard ought not to have been injected into this controversy, upon the theory that they are independent of appellee's right to redeem, and one that requires an entire separation in order to adjust the rights between appellants. Appellee tendered this issue. He was in a court of equity, and was entitled to have this issue, as between appellants and himself, determined. *Gaskell v. Viquesney* (1890), 122 Ind. 244, 248, 17 Am. St. 364; *Dailey v. Abbott* (1883), 40 Ark. 275, 282; *Ruckman v. Astor* (1842), 9 Paige 517.

In *Dailey v. Abbott*, *supra*, it is held: "As long as the right of redemption exists, the mortgagor is entitled to rent, if the mortgagee is in possession, taking the rents and profits. The statute prolongs the mortgagor's right of redemption for one year after the sale. The purchaser at the sale takes the place of the mortgagee, and if he takes possession of the land before the period of redemption expired, there is no good reason why he should not be accountable for the rents and profits. On redemption he gets the purchase money with interest at ten per cent. His vendor occupies no better position. 2 Jones, Mortgages, §1118."

As between appellants, this issue was not tendered, but we see no reason why their rights might not have been adjudicated in this suit, had they chosen to tender that issue, upon the theory of preventing a multiplicity of suits, but as this question is not before us, we decline further to consider it.

Appellants in their petition for a rehearing complain because we did not consider the sufficiency of the evidence to support the special findings. In their original

19. presentation of the case this question was not raised, and, not having been presented then, they are not entitled to raise it now and have it considered on a petition

for a rehearing. *Indiana Power Co. v. St. Joseph, etc., Power Co.* (1902), 159 Ind. 42; *Sunnyside Coal, etc., Co. v. Reitz* (1896), 14 Ind. App. 478.

Finding no reason for changing our former opinion in this case, the petition for a rehearing is overruled.

FLEENER ET AL. v. JOHNSON ET AL.

[No. 5,786. Filed March 28, 1906. Rehearing denied June 19, 1906.]

1. **BOARDS OF COMMISSIONERS.**—*Courts.*—*Nunc pro tunc Entries.*—*Notice.*—The board of commissioners has the power to make a *nunc pro tunc* entry in a proceeding pending before it without giving notice to the parties thereto. p. 336.
2. **AMENDMENTS.**—*To Objections Before Board.*—*Towns.*—*Elections.*—It is not an abuse of discretion of the trial court to refuse an amendment to objections, filed before the board of commissioners, so as to show that the ballots, used in an election to determine whether a certain territory should be incorporated as a town, were prepared by the county board of election commissioners, such question not being raised before the board because objectors were ignorant thereof. p. 337.
3. **EVIDENCE.**—*Certificates of Election Officers.*—*Towns.*—The certificates of the election officers, in an election to determine whether certain territory should be incorporated as a town, are *prima facie* evidence of the number of votes cast for and against such incorporation, but subject to overthrow by objectors' production of the ballots. p. 337.
4. **SAME.**—*Exclusion.*—*Question, How Saved.*—*Appeal and Error.*—To present any question, on appeal, on the exclusion of evidence, it is necessary for the record to show that a competent witness was sworn; that a proper question was asked; that an objection was made, followed by a statement of facts which the witness would state in response to the question; the court's ruling and the exception. p. 338.
5. **TRIAL.**—*Special Findings.*—*Agreed Facts.*—*Evidence.*—*Exclusion.*—*Appeal and Error.*—Where the special findings show that the facts therein set out have been agreed upon by the parties, exclusion of evidence bearing thereon is harmless. p. 339.
6. **ELECTIONS.**—*Towns.*—*Incorporation.*—*Objections.*—*Evidence.*—Where no objection is made before the board of commission-

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ers as to the legality of an election and no issue raised thereon on appeal to the circuit court, it is not error to exclude evidence thereof in such circuit court. p. 339.

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Petition by John W. Johnson and others against which Aaron M. Fleener and others remonstrate. From a judgment for petitioners, remonstrants appeal. *Affirmed*.

W. S. Shirley and *W. A. Johnson*, for appellants.

George W. Grubbs, for appellees.

ROBY, C. J.—Appellees, at the February term, 1904, of the Board of Commissioners of the County of Morgan, filed their petition for the incorporation of the town of Morgantown. Proof of survey, map, census and exhibition thereof as provided for in the statute relative to the incorporation of towns (§§4314-4322 Burns 1901, §§3293-3301 R. S. 1881) was made, "and the board having examined said petition and finding the same sufficient orders that an election be held on February 20, 1904." At the March term, on March 7, appellants appeared and moved to set aside the election theretofore held, and objected to the making of an order of incorporation, upon the stated ground that at the time of holding such election no order had been entered of record by said board ordering the same; that no record had been made showing the filing of said petition; that the requisite notice of said election was not given "as shown by the papers now on file," and that the petition was not sufficient to give the board jurisdiction. On March 8 the petitioners filed a motion asking that a *nunc pro tunc* entry be made showing the action actually taken by said board, as the same was shown by memoranda made by the board at the time. The motion was sustained and an extended and detailed entry made of such proceedings, appellant objecting thereto. Proof of an election held in conformity with said order having been made, a majority in favor of the incorporation of said town being shown, it

was adjudged that the same be incorporated as prayed. From this judgment appellants appealed to the circuit court, where they appeared specially and moved to strike out all that portion of the record entered *nunc pro tunc*, for the reason that said entry was made without any notice. The motion was overruled, and the venue of the case was changed to Johnson county, where the appellants asked leave to amend the objections first made by them before the board of commissioners, by adding thereto an allegation that the election held as aforesaid was illegal and void, in that the ballots used were not furnished by the board of election commissioners of Morgan county, of which fact they aver they had no notice when such original objections were filed. The court denied the amendment. The cause was heard, a special finding of facts made, conclusions of law stated and judgment for the petitioners rendered thereon. The finding states that "the following facts have been agreed to by the parties in this cause and that they shall be considered as a part of the record in the case." Following it is a detailed statement of facts conforming to the requirements of the statute. Appellants filed their motion for a new trial, the third ground thereof being based upon the admission as evidence of the return made by the officials holding the election; the fourth ground, upon the action of the court in refusing to allow the election commissioners to testify that they did not prepare or cause to be prepared the ballots used at said election, and the fifth and sixth grounds, that the decision was not sustained by sufficient evidence and was contrary to law. This motion was also overruled and such action is assigned as error.

The motion to strike out made in the circuit court is based upon lack of notice. The entry to which it relates was made while the proceeding before the board was

1. *in fieri*, and amounted to no more than an exercise of the inherent power to make the record conform to the action actually taken, in which case no notice is neces-

sary. *Fite v. Doe* (1820), 1 Blackf. 127; *M'Manus v. Richardson* (1846), 8 Blackf. 100; *Burnside v. Ennis* (1873), 43 Ind. 411; *Richardson v. Hawk* (1874), 45 Ind. 451; *Ralston v. Lothain* (1862), 18 Ind. 303; *Layman v. Graybill* (1860), 14 Ind. 166; *Schoonover v. Reed* (1879), 65 Ind. 313. The original objection was based not upon lack of action by the court but upon lack of record thereof so that the defect, if any did at the time exist, was a mere misprision of the clerk. *Security Co. v. Arbuckle* (1890), 123 Ind. 518, 521. Notice not being required there was no error in overruling a motion to strike out because of lack of notice. Treating the merits of the original objection as presented, the authorities above cited negative the contention that the court had no power to make its record conform to the order made. The power of the board of commissioners to make *nunc pro tunc* entries is established. *Tombaugh v. Grogg* (1896), 146 Ind. 99.

The court did not abuse its discretion in refusing to permit amendment of the objections first made by appellants. Assuming that the amendments might have

2. properly been allowed, no fact is made to appear from which an abuse of discretion can be inferred.

In support of the assignment that the court erred in overruling their motion for a new trial, appellants discuss the applicability to a proceeding of this kind of the

3. law governing general elections. It is shown by a bill of exceptions that the petitioners introduced in evidence a sworn report of the officers holding the election, from which it appears that an election was held; that 138 votes were cast, of which 78 contained the word "yes" and 60 the word "no." This evidence was objected to upon the ground that it was secondary and that the ballots themselves must be produced, which objection was overruled. It is further recited in said bill that said appellants, "at and upon the trial of said cause, to support their defense and issue in said cause, introduced J. E. Overton, a com-

petent witness, to prove by said witness the following." The statement then made is in substance that he was clerk of Morgan county at the time of the election referred to; that the board of election commissioners consisted of two persons named; that neither he nor said commissioners prepared or caused to be prepared the ballots used at said election; that they were ready and willing to prepare and print the same had they been called upon to do so. To the introduction of which testimony the petitioners objected on the grounds: (1) That said testimony is incompetent and immaterial under any issue in the case; (2) that there was no answer or remonstrance setting up the invalidity of said election. The objection was then sustained. It is further recited that appellant then offered to prove by said election officials the same facts as offered to be proved by the witness Overton, to which the petitioners objected upon the same grounds, and the same ruling was made. The objection that the testimony received was incompetent, as being secondary, is not well taken. It is the duty of election officers to canvass the votes cast. Their certificate becomes, therefore, competent evidence, and when introduced makes a *prima facie* case. *State, ex rel., v. Shay* (1885), 101 Ind. 36. Such *prima facie* case was subject to overthrow by the production of the ballots. *Pedigo v. Grimes* (1888), 113 Ind. 148.

In order to present a question upon the exclusion of evidence, the record must show the person whose evidence is desired, to have been present and sworn as a witness. It should further show that a question was propounded to him, an objection made thereto, followed by a statement of facts as to what the witness would state in response to the question, a ruling upon the objection and an exception. *Smith v. Gorham* (1889), 119 Ind. 436, 439; Elliott, App. Proc., §743.

The record before us is, in the respects indicated, insufficient to present any question for decision. The recital in

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the special finding of facts, that the facts therein
 5. stated "have been agreed to by the parties in this case," would in any event render a ruling upon the admission of evidence harmless. It would appear, from a parenthetical insertion in the bill of exceptions purporting to contain the evidence, that such agreement did not extend to all the facts found, but so far as the special findings are concerned they do not appear to have been limited.

There could be no error in excluding the evidence, since no question had been made before the board of commissioners as to the legality of the election or the accuracy of the result stated. The attempt to obviate this objection by amendment was, as before stated, not successful.

Judgment affirmed.

RICHARDSON v. STEPHENSON ET AL.

[No. 5,908. Filed June 20, 1906.]

1. QUIETING TITLE.—*New Trial as of Right.—Failure to Vacate Former Judgment.—Appeal and Error.*—The granting of a new trial in quieting title cases, upon the filing of a proper bond, is mandatory; and the Appellate Court will direct the prior decree to be set aside where a new trial was granted but such former decree was not formally set aside. p. 340.
2. PLEADING.—*Complaint.—Amendable Defects.—Statutes.—Appeal and Error.*—Where a complaint contains defects which might have been amended below, it will be held sufficient under §670 Burns 1901, §658 R. S. 1881. p. 341.
3. APPEAL AND ERROR.—*Demurrer to Complaint.—Amended Complaint.*—A demurrer to the complaint raises no question where an amended complaint is on file. p. 341.
4. SAME. — *Answer. — Sustaining Demurrer. — Facts Provable under Another Paragraph.*—Where the facts contained in a paragraph of answer are provable under another paragraph, sustaining a demurrer thereto is harmless. p. 341.

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5. **APPEAL AND ERROR.**—*New Trial.*—*Time of Filing.*—Where a decree was made on April 28 and the term closed on April 30, a motion for a new trial filed June 29 was too late. p. 341.
6. **SAME.**—*Right Result.*—Where the trial court reached the right result, its judgment will be affirmed. p. 341.

From Perry Circuit Court; *C. W. Cook*, Judge.

Suit by James A. Stephenson, Sr., and others against Irene Richardson and another. From a decree for plaintiffs, defendant Richardson appeals. *Affirmed.*

Stotsenburg & Weathers, James E. Stewart and Philip Zoercher, for appellant.

John W. Ewing and Sol. H. Esarey, for appellees.

ROBY, J.—This suit was brought by appellees to quiet title to a strip of ground claimed by virtue of a division made by the owners of a certain tract of land twenty years prior to its commencement. The suit was instituted against appellant and her husband. The original complaint was in two paragraphs, one to quiet title and the other for partition. The defendants filed an answer to both paragraphs, setting up ownership of the land in dispute and asking to have their title thereto quieted. A trial was had which resulted in a finding and decree for appellant and her husband. Within a year from date of decree, appellees filed a bond for a new trial as of right under the statute, which new trial, over the objection of appellant, was had. Pending the second trial her husband and codefendant died, and the case proceeded against the appellant upon the amended complaint, upon which issues were formed and a trial had, resulting in a finding and decree for appellees, from which decree this appeal is taken.

No record entry was made vacating the prior decree. The court had, however, no discretion but to grant a new trial and vacate the decree, upon the steps set out

1. by statute having been taken. *Anderson v. Anderson* (1891), 128 Ind. 254. It appearing that a new trial was in fact granted and had, a formal record

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thereof should have been made to conform to the fact, and the circuit court is therefore directed to make such record. *Harris v. Curtis* (1905), 34 Ind. App. 438, 440; *Merom Gravel Co. v. Pearson* (1904), 33 Ind. App. 174.

The third assignment challenges the action of the court in overruling appellees' demurrer to the first paragraph of amended complaint. The defect pointed out is one

2. which might have been amended by the court below, and will therefore be deemed to be amended in this court. §670 Burns 1901, §658 R. S. 1881.

The demurrer was directed to the plaintiffs' complaint, for which reason the assignment does not present

3. a question. The same is true of the demurrer to the second paragraph of complaint and the fourth assignment of error. There was no error in sustaining appellees' demurrer to appellant's third paragraph

4. of answer, all the facts therein averred being admissible under the general denial. *Watson v. Lecklider* (1897), 147 Ind. 395.

The appellant's motion for a new trial was filed June 29 in vacation. The decree appealed from was made on April 28 and the term closed on April 30. The

5. statute provides that a motion may be made at any time during the term at which the verdict or decision is rendered, and if such verdict or decision is rendered on the last day of any term a motion may be filed on the first day of the next term of court. The judgment appealed from was not rendered on the last day of the term, and the motion was not, therefore, made in time. *Dugdale v. Doney* (1903), 30 Ind. App. 240.

A review of the evidence leads to the belief that

6. the conclusion reached was the correct one upon the evidence.

Decree affirmed.

EVANSVILLE GAS & ELECTRIC LIGHT COMPANY
v. RALEY.

[No. 5,879. Filed December 13, 1905. Rehearing denied June 20, 1906.]

1. **MASTER AND SERVANT.—Assumed Risks.—Liability for.**—The master is not liable for injuries caused by defects, the risks of which are assumed. p. 344.
2. **SAME.—Assumed Risks.—Defects Open to Observation.**—The master, in the absence of a promise to repair, is not liable for patent defects. p. 346.
3. **SAME.—Electricity.—Light Poles.—Latent Defects.—Superior Position to Inspect.**—The servant employed to remove wires from an electric light pole is, as a matter of law, in a superior position to that of the master to detect latent defects in such wire and pole, and therefore assumes such risks. Roby, J., dissenting. p. 347.
4. **SAME.—Electricity.—Light Poles.—Duty to Inspect.**—Where a servant is employed to take down and put up electric light wires, such work being necessarily dangerous, the master is under no duty to inspect the electric light poles and wires to discover latent defects. Roby, J., dissenting. p. 347.
5. **TRIAL.—Burden of Proof.—Master and Servant.—Assumed Risk.**—The burden is upon the servant to prove that the defect causing his injuries was not an assumed risk. p. 349.
6. **MASTER AND SERVANT.—Electricity.—Light Poles.—Safe Place.**—A servant employed to remove wires from an electric light pole has no right to rely upon an implied representation that such pole is free from latent defects. Roby, J., dissenting. p. 349.
7. **SAME.—Electric Light Poles.—Accidents.—Maxims.**—Where an electric light lineman, according to orders, climbed a pole to remove a wire, and in doing so stuck his spur into the pole, and, by reason of a latent defect not observable by him, his spur hold broke out causing him to fall, his hand catching a wire from which the insulation had decayed, thus forming a short circuit and burning three fingers off of one hand and two off of the other, such injury is the result of an accident, and is *damnum absque injuria*. Roby, J., dissenting. p. 349.

From Gibson Circuit Court; O. M. Welborn, Judge.

Action by Jefferson C. Raley against the Evansville Gas & Electric Light Company. From a judgment on a verdict for plaintiff for \$3,000, defendant appeals. *Reversed*.

Evansville Gas, etc., Co. v. Raley—38 Ind. App. 342.

Miller, Elam & Fesler and *Elmer E. Stevenson*, for appellant.

H. M. Logsdon, D. Q. Chappell and *A. J. Veneman*, for appellee.

COMSTOCK, J.—Action by the appellee against the appellant for negligently causing his injury while in the employ of the appellant.

The complaint was in one paragraph, to which a demurrer for want of facts was overruled, and an answer in denial filed. A trial by jury resulted in a verdict for appellee for \$3,000.

Upon this appeal the overruling of appellant's motion for a new trial is the only error discussed.

The complaint alleges, in substance, that on August 22, 1902, and prior thereto, the defendant corporation maintained an electric light and power plant in the city of Evansville, and controlled certain lines of wires suspended upon poles in the streets. These wires were used for furnishing light and power in said city, and for that purpose powerful currents of electricity, dangerous to human life, were passed through them. It is averred that the defendant knew, when these wires were strung on the poles, that it would be necessary for its linemen to work "in and about the care and repair of said wires and poles," and that it was the duty of the defendant to keep the wires safely and completely insulated, so that linemen, lawfully about them, should not be injured by contact therewith, but that the defendant disregarded its duty, and negligently maintained said wires, and negligently failed to protect and cover said wires with safe and sufficient insulating material, and negligently permitted the covering used thereon to become defective and insufficient to render them safe to persons coming in contact therewith, all of which was unknown to the plaintiff prior to his injury. It is further alleged that the plaintiff was working as an employe of the defendant, and as a lineman, on the date mentioned, under the direc-

tion of a superior officer of the defendant, and was directed by said officer to ascend a certain pole, at the intersection of two streets in said city, for the purpose of untying the wires from a glass insulator, preparatory to transferring them to a new pole, to be erected in the place of the old one; that the defendant had negligently permitted the old pole to become defective, doty and rotten to such an extent that it was dangerous for the linemen to climb or stand on, all of which was unknown to the plaintiff; that the defendant, long prior to the date mentioned, knew, or, by the exercise of proper diligence, should have known, that the electric light wires were insufficiently insulated, and that the pole was defective, doty, rotten and dangerous; that the plaintiff ascended the pole in obedience to the order given, and while supporting himself thereon in the usual way, by sinking his climbing-spurs into the body of the pole, and while engaged in the act of carrying out his instructions, by pushing the wires from the grooves of the insulators, one of his spurs, "by reason of the defective, doty, rotten and dangerous condition of said pole, broke and slipped from its hold, causing plaintiff involuntarily to reach out in an effort to support himself from falling, and to touch and come in contact with said wires, highly charged with electricity, as aforesaid," and by reason and on account of the defective and imperfect insulation thereof, as aforesaid, he received a current of electricity into his body, whereby he was greatly shocked, wounded and injured, and for a long space of time was prevented from performing ordinary business, etc.

One of the reasons for a new trial is that the verdict of the jury is not sustained by sufficient evidence; another, that the verdict of the jury is contrary to law.

If the injury to appellee was due to risk assumed by him as incident to the employment, he was not entitled to recover. Of course upon this proposition there is no

1. controversy. The facts are substantially as follows: Appellee was injured on August 22, 1902, at

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about 9 o'clock in the morning. He had had three years experience as a lineman. On the day he was injured he had on his spurs or climbers, but he climbed the pole by means of steps and it was not necessary to use the spurs. The pole was about forty-five feet high and fifteen inches in diameter at the bottom. It was twelve years old, which was about the usual life of such poles. It looked to be ten years old. It appeared sound at the lower end. Toward the top it was, in fact, sap-rotten, although it was painted and its condition apparent only to one on the pole thrusting spikes or spurs into it. Some twelve feet below where appellee was hurt there was also a large surface sap-rotten, and at the place where he was injured only a small place seemed to have broken through, when observed after his accident. Appellee had never seen the pole or wires mentioned until the morning of the accident, when he went up to carry out the instructions of his foreman, and did not know how long they had been in use. The pole was being removed for the purpose of placing a taller one in its place. Appellee made no examination of the pole, and did not test it in any way. It carried from four to six cross-arms, upon which were strung about twelve copper wires. These wires had also been in place on the poles about twelve years, and were protected by a rubber covering. They were strung far enough apart so that a lineman had plenty of room to go up the pole without touching them, and turn his body about in doing the work without coming in contact with the wires. They carried about 2,000 volts of electricity. The rubber covering had been affected by exposure to weather, and it was discovered after appellee's accident that there was a space upon one of the wires near where he worked that was exposed. He ascended the pole for the purpose of untying the wires which were tied to glass insulators with short pieces of small wire, and then pushing them off the cross-arms, so that the pole could be removed and another substituted.

He had no special instructions as to the manner of doing the work, but was told by the foreman to go up and remove the wires. At the top of the pole he did some work and then came down several feet, until he was below the last cross-arm. He placed his spurs in the pole, put his safety-belt around his body, and fastened it to the belt round the pole, to prevent falling, and began working at that place. With his right hand he was untying a wire, and the one upon which he was at work was the one which was afterward discovered to be not fully covered with the rubber. While thus engaged he thought that his spur on the left side broke out of the pole, causing him to go down a little until the belt held him. In so doing he apparently threw out his left hand and placed it upon another wire, about eighteen inches away, and thus created what electricians call a short circuit. By so doing he received a violent shock; was found unconscious, held by the belt and both hands burned. The wires were being removed from the pole in the usual way, and appellee admits that the foreman told him before he began the work that he should work the wires as if they were hot, or heavily charged with electric current. This was also the usual way of handling such wires, for the reason that all understood that they were likely to be heavily charged and that short circuits should be avoided, for, if one was created, no insulation could be depended upon against injury, and this was understood by appellee. Appellee paid no attention to the rubber upon the wires or their general condition, although he was in a position readily to see them.

Neither the employer nor the employe knew the condition of the pole or the wires. No complaint was made upon the part of the one; no promise by the other. Under

2. such circumstances an employe is required to use his senses to ascertain the condition of the appliances he is to use, and the place in which he is to work, and he assumes the risks which he could have discovered by the

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discharge of this duty. *Pennsylvania Co. v. Ebaugh* (1899), 152 Ind. 531; *Wabash R. Co. v. Ray* (1899), 152 Ind. 392; *Bedford Belt R. Co. v. Brown* (1895), 142 Ind. 659; *Western Union Tel. Co. v. McMullen* (1895), 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351.

The appellee was in the best position to ascertain the condition of the wires and of the pole, but no superficial inspection would have disclosed the condition of

3. the pole. The rule referred to is especially applicable when the situation changes as the work progresses, and the employe has the better opportunity to observe the existing conditions. *Island Coal Co. v. Greenwood* (1898), 151 Ind. 476; *Perigo v. Indianapolis Brewing Co.* (1899), 21 Ind. App. 338; *Vincennes Water Supply Co. v. White* (1890), 124 Ind. 376; *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 63 L. R. A. 460.

It was the duty of the appellee to do the work in which he was engaged. He necessarily knew that the work of climbing poles and taking down and putting up

4. wires was dangerous work, that the life of the pole was limited, and that any pole after a time would become unsound. Was it the duty of the defendant to the lineman, considering the character of his employment, to inspect each pole and inform him whenever any of them were so decayed as to be unsound? We think not. As was said in *McIsaac v. Northampton Electric, etc., Co.* (1898), 172 Mass. 89, 90, 51 N. E. 524, 70 Am. St. 244: "When he engaged to work for the defendant, he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much more than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which

a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it." In the case from which we have quoted, it was held that an electric lighting corporation owes no duty to a lineman in its employ to inspect, below the surface of the ground, poles upon which its wires are suspended, to see if they are decayed, but a lineman, when he enters its service, assumes the risk of the breaking and falling of an old pole when he is working upon it, if he does not take measures to ascertain its condition before going upon it, and he cannot maintain an action against the corporation for personal injuries sustained from that cause, and that evidence that the corporation has made no inspection of the pole prior to the accident is immaterial.

The exercise of ordinary care upon the part of the appellant would have disclosed no more than the exercise of the same degree of care by appellee. Appellee's opportunities for observation were the better of the two. As between the two, appellant was under no obligation to inspect the poles. *McIsaac v. Northampton Electric, etc., Co., supra; Kellogg v. Denver City Tramway Co.* (1903), 18 Colo. App. 475, 72 Pac. 609.

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The burden is upon an employe to show that an injury received is not the result of a risk of the business assumed, and in this case there is no evidence that the risk

5. arising from a defective pole or dangerous wires was not assumed. It does not appear that appellee went up the pole relying upon any examination or test of its condition. The dismantling of a pole—old or new, sound or decayed—of wires, is obviously attended

6. with risks. It is certainly not a case in which appellee can rely upon an implied representation that the place was safe for his work. Appellee was not misled as to the conditions surrounding him. *Kellogg v. Denver City Tramway Co.*, *supra*; *Tanner v. New York, etc. R. Co.* (1902), 180 Mass. 572, 62 N. E. 993; *Roberts v. Missouri, etc., Tel. Co.* (1901), 166 Mo. 370, 66 S. W. 155.

No assurance of safety was given, nor anything said or done to make appellee less careful than he might otherwise have been. He knew that his safety was to be secured by avoiding a short circuit; that is, contact with two wires at the same time, each heavily charged with a certain kind of electricity. Appellant had reason to believe that this would be done. The complaint is not upon the theory that appellee did not understand the danger of his work, or that he was not instructed. The legal presumption is that in assuming the duties of his employment he assumed the risks so far as reasonable diligence on his part could discover them, and the evidence shows that he was in the best position to judge of the conditions that surrounded him. He probably did not make the observations within his power, because he did not anticipate the unusual circumstances which resulted in his injury.

Appellee cites many cases in which the injured party recovered damages against defendants, but to whom they did not sustain the relation of employe, and the ques-

7. tion of assumption of risk did not therefore arise. Manifestly the appellee's misadventure belongs to

that large class of events occasioned by unlooked for conditions, called accidents. As great as appellee's misfortune is shown to be, we are of the opinion that under the law and the evidence he is not entitled to recover.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ON PETITION FOR REHEARING.

PER CURIAM.—The petition for a rehearing herein is denied.

DISSENTING OPINION.

ROBY, J.—The negligence alleged in the complaint must be taken as established by the verdict, and the sufficiency of the facts to support it in that behalf is not questioned.

It appears from the opinion that the defects complained of, both of which contributed to the injury and both of which were caused by the negligence of a single defendant, were latent and concealed ones. It is entirely well established that the employe is not required to search for latent and concealed dangers of which he has neither actual nor constructive notice. *Salem Stone, etc., Co. v. Teppes* (1894), 10 Ind. App. 516, 519.

It is also established that an employe assumes risks naturally and ordinarily incident to the service in which he engages. *Wortman v. Minich* (1901), 28 Ind. App. 31; *Lake Shore, etc., R. Co. v. McCormick* (1881), 74 Ind. 440, 445. Danger caused by the master's negligence is not a necessary incident to the service, and the risk arising therefrom is not an assumed, incidental one. *Barley v. Southern Ind. R. Co.* (1903), 30 Ind. App. 406.

"The risks of the service which a servant assumes in entering the employment of a master, are those only which occur, after the due performance by the employer, of those duties which the law enjoins upon him." *Benzing v. Steinway* (1886), 101 N. Y. 547, 5 N. E. 449. See, also, *Stringham v. Stewart* (1885), 100 N. Y. 516, 3 N. E. 575;

Pantzar v. Tilly Foster Iron Min. Co. (1885), 99 N. Y. 368, 2 N. E. 24.

The employe also assumes risks arising from open and obvious defects. The danger arising therefrom must be either actually or constructively known to him, and he must also be charged with actual or constructive appreciation of the danger out of which the assumed risk arises. *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541. Nothing short of this can form the basis of an implied contract upon which the doctrine of assumed risk depends in this State. *Wortman v. Minich*, *supra*. It is said in the opinion that "appellee was in the best position to ascertain the condition of the wires and the pole, but no superficial inspection would have disclosed the defective condition of the pole." This statement is inaccurate as to facts. The appellee had never seen the pole until a moment before he climbed it. He did not know how long it had been in place, or how long the insulation had been upon the wires. He climbed the pole by means of a ladder. It does not appear that he ever sank a spur into it until he did so to do the work in the performance of which he was injured. Neither does it appear that there was anything in the resistance made by the pole to the settling of the spur which attracted his attention to its condition. The general verdict offers all inferences for appellee, and this court cannot say that the fixing of the spur in the pole at that time gave or should have given appellee notice of the rotten condition thereof. The appellee was not in the best position to ascertain the condition of the pole and wires. The rules regulating the respective duties of employer and employe have been so many times declared that it seems superfluous to repeat them.

"The appellee was not required on that occasion to make a special examination or critical investigation to ascertain whether the bent had been carefully or negligently raised, or whether it was then in an unsafe or dangerous position, before obeying the command of the master. When directed

to do the act in the performance of which he was injured, he had the right to assume that the street commissioner, with his superior knowledge of the facts, would not expose him to unnecessary peril." *City of Lebanon v. McCoy* (1895), 12 Ind. App. 500. See, also, *Ohio, etc., R. Co. v. Percy* (1891), 128 Ind. 197.

If an employe, reposing confidence, as he has a right to, in the prudence and caution of the employer, relies upon the adequacy of the implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure and neglect of the employer to disclose latent defects or perils, which the latter knew, or which he should have known by the exercise of reasonable diligence the employe is entitled to remuneration for his loss. *Bradbury v. Goodwin* (1886), 108 Ind. 286; *Krueger v. Louisville, etc., R. Co.* (1887), 111 Ind. 51, and cases cited; *Mitchell v. Robinson* (1881), 80 Ind. 281, 41 Am. Rep. 812; *Boyce v. Fitzpatrick* (1881), 80 Ind. 526; *Atlas Engine Works v. Randall* (1885), 100 Ind. 293, 50 Am. Rep. 798; *Indiana Car Co. v. Parker* (1885), 100 Ind. 181; *Louisville, etc., R. Co. v. Frawley* (1887), 110 Ind. 18; *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151; *Pennsylvania Co. v. Whitcomb* (1887), 111 Ind. 212; *Stringham v. Stewart, supra*; *Pantzar v. Tilly Foster Iron Min. Co., supra*; *Bean v. Oceanic Steam Nav. Co.* (1885), 24 Fed. 124; *Postal Tel. Cable Co. v. Likes* (1907), 225 Ill. 249, 80 N. E. 136.

"It is equally true that the master is bound to use ordinary care and diligence in providing reasonably safe and suitable machinery and appliances for his servants, and is liable for injuries resulting from his failure to perform this duty. He is also chargeable with notice of the natural tendency of machinery and implements to wear out and decay with use and age, and is therefore required to exercise an active and continuing supervision and vigilance to maintain them in a reasonably safe condition. * * * A servant may rightfully act upon the presumption that the

master has performed his duty in supplying proper machinery and appliances unless he has notice otherwise, or facts are patent and come within the reasonable range of his observation, which would excite the apprehension of a reasonably cautious person, and put him upon inquiry.

* * * While a servant may have an opportunity, he is not bound to make a critical examination of the condition of an implement or item of machinery before using it, to ascertain if it contained any latent defects, unless so required by the terms of his employment." *Louisville, etc., R. Co. v. Berry* (1891), 2 Ind. App. 427, 430. See, also, *Indiana Car Co. v. Parker, supra*; *Bradbury v. Goodwin, supra*.

In the statement or the opinion that "the exercise of ordinary care upon the part of appellant would have disclosed no more than the exercise of the same degree of care by the appellee," the court usurps the functions of the jury, forgetting that an appellate tribunal is not at liberty to weigh evidence and does not approach the issue as the trial court does, but is bound to take the facts as they have been determined. The opinion also ignores the superior knowledge of appellant and appellee's actual ignorance of the conditions by reason of which he was injured. The character of the defects complained of furnishes the foundation for the conclusion reached by the jury and prevents this court from justly saying, as a matter of law, that it was appellee's duty to have known of the danger to which he was subjected. The master's duty is to furnish a safe place and safe appliances. It requires appellant to take notice of the tendency of wood to decay, and of the effect of exposure upon the perishable material with which it chose to insulate the wires in question. It knew the time during which such processes had been going on, and was bound to take notice of them, and duly and reasonably to guard against them. Appellee was under no duty, as before stated, to search for latent and concealed defects, and

had no information tending to put him upon inquiry. He protected himself, by means of a safety-belt, from falling to the ground. A slip, caused by the defective pole, was productive of a painful injury, he thereby being brought in contact with a wire negligently allowed to remain without sufficient insulation. Both causes which contributed to his injury were created by the negligence of a single defendant, and the finding of the fact against such defendant ought, so far as the question of proximate cause is concerned, to be reasonably safe from the logic of this court.

Appellee did not inspect or examine either the pole or insulation upon the wires. He did not know that there was any defect in either, nor how long the pole had been in use, nor how long the insulating material had been upon the wires. The statement in the opinion "that appellee admits that the foreman told him before he began the work that he should work the wires as if they were hot," is not an ingenuous way of stating that appellee's attorney asked him upon his original examination, the following question: "Now what did he say to you or what was said to you there, if anything, about working the wires? A. Why, Mr. Fisher said to work those wires as if they were hot."

It is not suggested by appellant that appellee did not comply with the order thus given. No detail of his procedure is criticised. He unfastened the outside wire and took hold of it with his right hand to push it off of the cross-arm. The wires made an angle at this pole, and considerable force was required to remove it. While exerting such force, the spur on his left foot tore out of the pole, causing him to lose his balance and to bring his left hand in contact with a second wire, thereby forming a short circuit and instantly depriving him of consciousness. Three fingers were burned off of one hand and two off of the other, and he was otherwise injured.

Appellant's negligence formed an element in the injury complained of, and takes the occurrence out of the category

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of mere accidents. An accident, in the sense in which the term is used, is an occurrence to which human effort does not contribute. "A pure accident, where there is an absence of negligence, will not supply a cause of action, but where the accident is attributable to the negligence of the defendant, it is otherwise." *Nave v. Flack* (1883), 90 Ind. 205, 210, 46 Am. Rep. 205.

I am convinced that a decision which relieves owners of electric light and other poles of a similar nature from all responsibility in cases of this sort ought not to be made, and that the petition for a rehearing herein should be sustained.

 LINDLEY v. KEMP ET AL.

[No. 5,457. Filed December 15, 1905. Rehearing denied April 27, 1906. Transfer denied June 21, 1906.]

1. **APPEAL AND ERROR.**—*Record.*—*Motion to Strike Out Sustained.*—*Statutes.*—A motion to strike out parts of a complaint, which fails to set out the parts to be eliminated, is not sufficient, under the act of 1903 (Acts 1903, p. 338, §2, §641b Burns 1905), and where the record shows such motion was sustained in part and overruled in part, but such motion is not brought into the record by a bill of exceptions, it cannot be considered. *Fairbank v. Lorig*, 4 Ind. App. 451; *DeKalb Nat. Bank v. Nicely*, 24 Ind. App. 147; *Union City, etc., Co. v. Jaqua*, 26 Ind. App. 160, overruled. p. 357.
2. **SAME.**—*Answers to Interrogatories to Jury.*—*Precipe.*—*Record.*—A precipe calling for "all entries of the trial in this cause" includes the answers to the interrogatories to the jury, such answers being a part of the record without a bill of exceptions. p. 358.
3. **WORDS AND PHRASES.**—"Trial."—The word "trial" includes all of the steps taken in a cause from submission to the jury to the rendition of judgment. p. 359.
4. **APPEAL AND ERROR.**—*Precipe.*—"Special Verdict."—*Answers to Interrogatories to Jury.*—A precipe calling for the "special verdict" is sufficient to include the answers to the interrogatories to the jury, a liberal construction being given in such matters. p. 359.

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5. **TRIAL.—Verdict.—General.—When Controlled by Answers to Interrogatories to Jury.**—The general verdict is controlled by the answers to the interrogatories to the jury only when in irreconcilable conflict therewith. p. 366.
6. **SAME.—Verdict.—General.—Special.—Irreconcilable.—Test.**—If, considering the pleadings, facts could have been proved which would support the general verdict regardless of the answers to the interrogatories to the jury, the general verdict controls. p. 368.
7. **PLEADING. — Complaint. — Damages. — Misrepresentations of Law and Fact.**—A complaint for damages for misrepresentations of matters of law and fact is good if it contains enough misrepresentations of facts to constitute a cause of action. p. 368.
8. **FRAUD. — Deceit.—Conspiracy.**—Misrepresentations made to an old, helpless and infirm lady, incapable of attending to her business, by which the conspirators secured possession and legal title to her property, without her consent, constitute actionable fraud. p. 368.
9. **TRIAL.—Limitation of Actions.—General Verdict.—Special.**—A general verdict for plaintiff is a finding against defendants upon their defense of the statute of limitations, and where the answers to the interrogatories to the jury do not show otherwise, such verdict is conclusive on appeal. p. 369.

From Randolph Circuit Court; *Henry C. Fox*, Judge.

Action by Mary E. Lindley against Benjamin F. Kemp and others. From a judgment for defendants, plaintiff appeals. *Reversed in part. Affirmed in part.*

Nichols & Carter, for appellant.

Engle, Caldwell & Parry, for appellees.

MYERS, J.—This is an action by appellant against appellees for damages. A single paragraph of complaint answered by appellees Wooten and Wooten (1) in general denial; (2) setting up the statute of limitations, and like answers by appellee Kemp. To appellees' special answer appellant replied (1) in general denial; (2) concealment of her cause of action. The issues thus formed were tried by a jury, and interrogatories submitted to them were answered and returned, with a general verdict for appellant.

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Judgment for appellees on the answers to the interrogatories notwithstanding the general verdict.

The only error assigned is based upon the ruling of the court in sustaining the separate and several motions of appellees for judgment *non obstante veredicto*.

I. Appellees contend that this court ought not to consider any of the alleged reasons for a reversal of this cause, for the reason that it is impossible to tell from the

1. record what were the issues before the trial court.

We take the following statement from the record: On October 30, 1901, the complaint was filed. On November 13, 1901, appellees filed a joint motion, and on March 14, 1902, appellee Kemp filed his separate motion, and Wooten and Wooten their joint motion, to strike out certain parts of the complaint. By reference to the motions copied in the record it will be seen that the words sought to be stricken out of the complaint are not set forth, but are indicated by references to pages and lines of the complaint. This is not a sufficient statement of the parts stricken out. Acts 1903, p. 338, §2, §641b Burns 1905. By an order-book entry copied in the record it appears that these motions were by the trial court sustained in part and overruled in part. It is true that this entry does not disclose what parts of the complaint are stricken out, but, even if it did, the ruling and motions are not in the record by a bill of exceptions or by an order of the court, and for that reason they cannot be considered as a part of the record for the purpose of showing that any such motions or rulings were made. *Crystal Ice Co. v. Morris* (1903), 160 Ind. 651; *Dudley v. Pigg* (1898), 149 Ind. 363. Therefore, under the rule imputing absolute verity to the record, this court must consider the complaint as found in the record. The cases of *Fairbank v. Lorig* (1892), 4 Ind. App. 451, *DeKalb Nat. Bank v. Nicely* (1900), 24 Ind. App. 147, and *Union City, etc., Co. v. Jaqua* (1901), 26 Ind.

App. 160, upon this particular point are, by *Crystal Ice Co. v. Morris, supra*, overruled.

II. Appellees also insist that the precipe does not direct that the interrogatories submitted to the jury and their answers thereto be made a part of the transcript,

2. and, although copied into the record, the clerk's certificate does not show such interrogatories to be the ones submitted to the jury, or that they had been correctly copied, and for these reasons no question is presented for our consideration. We think these objections too technical, and ought not to prevent the consideration of this cause upon its merits. That part of the precipe referred to by appellees reads as follows: "All entries of the trial in this cause, the verdict of the jury, both special and general, defendants' motion for judgment on answers to interrogatories notwithstanding the general verdict, and the ruling and judgment thereon." The clerk's certificate in this particular is identical with that of the precipe. It will be noticed that the error based on the ruling of the court is properly assigned.

The General Assembly of this State in 1897 amended our laws concerning civil procedure with reference to forms of verdicts found by juries, and by section one (Acts 1897, p. 128, §555 Burns 1901) provided "that in all actions hereafter tried by a jury, the jury shall render a general verdict, but in all cases when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause, and this shall be the only form of verdict submitted to or rendered by the jury in the cause: Provided, the provisions in this section shall not apply to cases in equity. These interrogatories are to be recorded with the verdict."

The jury returned a general verdict. They found upon particular questions of fact, submitted to them in the form

of interrogatories. These interrogatories were submitted and recorded with the general verdict. They appear as a part of the proceedings of this cause, and as a part of the same order-book entry in which the verdict of the jury is recorded. That part of the order-book entry referring to the interrogatories reads as follows: "The jury also returned the interrogatories submitted to them by the court, together with their answers thereto, which interrogatories and answers are in these words, towit." Then follows a copy of the interrogatories and answers, each signed by the foreman of the jury. They are a part of the record, without a bill of exceptions or an order of the court. They are included by the request for "all entries of the trial in this cause." For, by general acceptance or use,

3. the word "trial" includes "all the steps taken in the case from submission to the jury to the rendition of judgment." Anderson's Law Dict., 1054. See, also, *Bruce v. State* (1882), 87 Ind. 450, 453; *Jenks v. State* (1872), 39 Ind. 1, 9.

It is apparent that the words "special verdict," as used in the precipe and in the clerk's certificate to the transcript, had reference to the interrogatories and the answers

4. thereto, and we cannot disregard them because of a misnomer, or because their treatment by the parties would seem to assign to them an effect not now authorized by our code of civil procedure. See *Louisville, etc., R. Co. v. Balch* (1886), 105 Ind. 93, 97.

In *Powell v. Bunger* (1883), 91 Ind. 64, 72, the court in speaking of a precipe recognized a liberal rule of construction by saying: "This court will not be prevented by informality or omission in appellants' written directions for a transcript, from looking into any portion of the record before it, as may become necessary to a proper decision of the cause." See, also, Elliott, App. Proc., §§200, 201.

III. In passing upon the real question here presented, we are confronted with a complaint containing many al-

leged fraudulent representations, and abounding with allegations of tortuous acts, many of which within themselves would support an action for damages; but, upon the theory of fraud as a basis of recovery, a reasonably full statement of the facts appearing in the complaint will not be out of place, because, as said by Chancellor Kent (2 Kent's Comm., *484): "A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design." From the complaint it appears that on April 1, 1890, appellant was the owner of a life estate in certain described real estate in Randolph county, Indiana, containing eighty acres. Four of her children, including Emma L. Dougherty and appellee Susie A. Wooten, were the owners of the land in fee. Another of her children, Zenas C. Lindley, a minor, was the owner of a forty-acre tract in the same county. Appellant had the management of her son's real estate, and was in possession of both tracts. On said day of April, and for a long time prior thereto and thereafter, appellees conspired and confederated together to cheat and defraud appellant and her children, except appellee Susie A. Wooten, out of their real estate by falsely and fraudulently pretending and representing to appellant and Emma L. Dougherty that appellant did not have to pay any taxes on the real estate, that she was a widow and her son an orphan, and by reason thereof the lands could not be taken from them for taxes, and that neither should pay any attention to the payment of taxes or to any notice for the payment thereof. During the time of the making of said false and fraudulent representations appellees Wooten and Wooten lived with appellant on the real estate, and took possession of and appropriated to their own use all of the proceeds arising therefrom, with the knowledge and connivance of appellee Kemp, for the purpose of depriving appellant of any means with which to pay

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her taxes. Appellant was at the time an old woman, a widow, infirm by reason of her age and ill health, inexperienced in business affairs, ignorant of the law concerning such matters, and, by reason of her age, infirmity, inexperience, and ignorance of the law, was incapable of attending to her affairs. Appellees herein well knew of the helpless condition of appellant. Appellee Kemp is appellant's brother, a minister of the gospel, and a successful business man, who had at said time accumulated a large estate, and by reason of his relationship, his great profession as a Christian, his successful business management and career, she (appellant) and said Emma L. had great faith and confidence in him, and relied upon him generally for counsel, and especially relied upon him as to his false and fraudulent representations concerning her taxes, and by reason of such reliance failed to give any attention to her taxes. All of her said children were unable to pay said taxes, except Emma L., who was able to pay the same, and would have done so, had it not been for the aforesaid fraudulent representations. The taxes were not paid, and on February 9, 1891, the land was sold for taxes to William A. Edgar, who on December 10, 1891, sold and transferred the tax certificate to Wilder G. Parent, and on February 11, 1893, appellant and said Emma L., still relying upon the representations made to them by appellees, Kemp, Wooten and Wooten, failed to redeem said lands, and the auditor of said county executed to Parent a tax deed for the lands, who, on January 1, 1894, sold and conveyed the same by quitclaim deed to John W. Macy. In an action by Macy against appellant and her children in the Randolph Circuit Court, on May 12, 1894, the tax deed was adjudged ineffectual to convey title, a lien given Macy for the taxes so paid, a decree of foreclosure entered, and at the former's office an agreement was entered into by which Macy was to convey the real estate to plaintiff upon her executing to him a mortgage on the land for \$500. As a

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part of the agreement Macy was to and did prepare a mortgage and note, and by mail sent them to her at Jordan post-office, that being her post-office address. Appellees Wooten and Wooten, knowing of said agreement, for the purpose of cheating and defrauding her, took said mortgage and note from said post-office and never delivered them to her, but, on the contrary, secreted the same, thereby preventing the execution thereof according to said agreement, and thereby keeping from her all knowledge of their preparation until long after the execution of the deed to appellees, and until after said Wooten and Wooten had vacated the dwelling-house, and the note and mortgage were found among papers there left by them. On September 8, 1894, pursuant to the aforesaid decree, the sheriff of said county, after due notice, sold to Macy the eighty-acre tract for \$354.57, and the forty-acre tract for \$99.65. On October 7, 1895, appellee Kemp represented to Macy that appellant was incapable of caring for herself and those depending upon her for support, and that he (Kemp) was her brother and desired to care for her, and for that purpose desired Macy to convey the real estate to him, and, if he would do so, he (Kemp) would hold it for appellant and care for her, and see that she did not suffer, and Macy, under the belief that appellant had refused to execute the mortgage and note, and not knowing that the same had been concealed from appellant, and desiring that the land should be held for the use and benefit of appellant, and intending to claim no interest therein except the amount by him invested, interest thereon and reasonable compensation for the expense and trouble the same had caused him, but relying upon the representations of Kemp so made to him in regard to his sister, for the nominal consideration of \$900, conveyed said lands to Kemp, reserving for appellant the house, garden, truck patch and a certain field, as then situated, October 7, 1895, so long as appellant should use and occupy the same. The eighty-acre tract was of the value

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of \$4,000, and the forty-acre tract of the value of \$2,000. Appellee Kemp at the time of making the representations to Macy had no intention of holding the lands for the use of appellant or for caring for her, and he has not so held said lands nor in any way cared for her, but permitted her to suffer for want of food, clothing, fuel and the necessities of life, and for which she has been compelled to work and labor for hire for those who would employ her, and to accept assistance from the overseer of the poor. The promises so made to Macy were false and fraudulent, and made in pursuance of the conspiracy to cheat and defraud the appellant out of her said lands. Had said Macy known that said representations were false and fraudulent, and that the mortgage and note had been withheld and concealed from appellant, he would not have conveyed the lands to Kemp, but would have conveyed the same to appellant according to the agreement and arrangement with her as aforesaid. On October 31, 1895, Kemp conveyed the eighty-acre tract to Wooten and Wooten for the consideration of \$690. The life estate in the real estate so conveyed was of the value of \$3,000. Appellant had no knowledge of the fraudulent purpose of appellees until the discovery of the mortgage and note in the papers of Wooten and Wooten. Had she known of the preparation of the note and mortgage she would have executed it long before the execution of the deed to Kemp, and would have received the conveyance to herself as agreed by and with Macy. For the purpose of obtaining possession of that part of the eighty-acre tract reserved to appellant by Macy in his deed to Kemp of October 7, 1895, and in pursuance of their purpose to cheat and defraud appellant, and with the advice, knowledge and consent of Kemp, Wooten and Wooten maliciously and unlawfully and with force entered upon the reserved portion of said lands, tore down and removed buildings of the value of \$100, removed fences of the value of \$100, allowed their cattle and hogs to run at will upon

the lands of appellant, destroyed her crops for the past six years, to her damage in the sum of \$500, took possession of and rendered her barn unfit for use, to her damage in the sum of \$100, took the pump, of the value of \$10, from her well, and used appellant's well to water their stock by taking water therefrom with a slop-bucket, rendering the water in the well unfit for domestic use, and by force took possession of her corn-crib, kept hogs which ate her chickens, carried away her oats and other grains, took the fodder kept by her to feed her horses, turned her cows into the highway, made a hog-pen of her dooryard, thereby creating a stench, to her discomfort and annoyance, rendering her dwelling unfit for occupation. By the terms of the reservation in said deed of Macy to Kemp, all rights thereunder in favor of appellant would be null and void whenever appellant should cease to use and occupy the same as a home and residence, and the use of the lands so reserved would fully vest in appellees Wooten and Wooten, all of which was well known to appellees, and by reason of the foregoing she demands damages, etc.

The record contains a copy of all of the other pleadings in the cause, and we have heretofore indicated the issue they tender. The jury, in answer to interrogatories, found that on April 1, 1890, appellant was the owner of a life estate in eighty acres of land in Randolph county, Indiana, and that four of her children, including the appellee Susie A. Wooten, were the owners of the fee. Appellant was, until February 9, 1891, the owner of the rents and profits of a certain forty-acre tract of land, described in the complaint. Appellant was then, and had been since 1879, a widow. All of the real estate described in the complaint was sold by the treasurer of Randolph county in February, 1891, for the nonpayment of taxes for the years 1890 and 1891, to William A. Edgar, who on December 10, 1891, sold and assigned his said tax certificate to Wilder G. Parent, who on February 11, 1893, surrendered his tax-sale

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certificate to the auditor of said county, and received a tax deed for all of said real estate. On January 1, 1894, said Parent conveyed said real estate by quitclaim deed to John W. Macy, and on May 12, 1894, in a proceeding brought in the Randolph Circuit Court by Macy against appellant and others said tax deed was declared ineffectual to convey title, and a lien for the amount of taxes, etc., declared on said real estate, and the same was ordered sold to pay such lien. On September 8, 1894, by virtue of a decree issued on said judgment, the land was sold to John W. Macy, who paid for the eighty-acre tract \$354.57, and for the forty-acre tract \$99.65, and on the same day received a deed from the sheriff for all of said real estate. Macy prior to that time had no interest in the land except his lien for taxes. Between the years 1881 and 1890 appellant paid the taxes on all said real estate, and knew at the time she was paying the same that it was subject to taxation. On August 16, 1894, there was an agreement between Macy and appellant whereby Macy agreed that he would convey all of the real estate described in the complaint, upon the condition that appellant and certain of her children would execute to him a mortgage on said real estate for \$500 in full of Macy's lien on the premises, and compensation for his trouble and expense in perfecting his lien. This agreement was oral, and at the time of making it appellant knew that Macy's lien on the land grew out of the nonpayment of taxes thereon, and that he at no time made any other agreement with appellant in relation to this land, and had no other interest in the same except as above stated, and no other title except that received from the sheriff on said September 8. This action was begun October 30, 1901. Appellee Susie A. Wooten is the daughter of appellant, and at no time conspired and confederated with appellees William Wooten and Benjamin F. Kemp, or either of them, to defraud appellant out of her interest in the land described in the complaint, or any part thereof, nor was she at any time

a party to a conspiracy for that purpose, nor did she at any time make any statements or representations to the appellant for that purpose, nor did she at any time do any act or perform any deed, nor did she at any time counsel, advise or assist any person or persons in the making of any fraudulent statements or representations to appellant for that purpose. Said Macy on October 7, 1895, conveyed to appellant a tract of three or four acres out of the eighty-acre tract in the complaint described, and on the same day conveyed all the remainder of said lands to appellee Kemp, and thereafter had no further interest therein. Kemp on October 31, 1895, conveyed the land so received by him from Macy to appellees William Wooten and Susie A. Wooten, and after October 7, 1895, neither of the appellees made any representation to appellant relative to the non-payment of taxes or as to her duty to pay the taxes. After October 7, 1895, appellees Kemp and William Wooten concealed from appellant her cause of action set up in the complaint by Kemp's deeding the land to the Wootens without appellant's knowledge.

The general verdict was in favor of appellant, and was therefore a finding in her favor upon every issuable fact presented by the record, and is entitled to every

5. reasonable presumption in favor of its support, and will not be overthrown by special findings, unless upon the face of the record it appears that they are so antagonistic that both cannot stand. This familiar rule does not require the citation of authority to support it, and, when applied to the case at bar, warrants the conclusion that as to the appellee Susie A. Wooten there can be no recovery, for the reason that the facts specially found absolutely absolved her from the charges made in the complaint, and are therefore antagonistic to the general verdict from every standpoint on which a recovery could be had under the issues. As to appellees William Wooten and Benjamin F. Kemp there is no such antagonism.

The findings are silent as to the representations of Kemp, and the purposes for which made; as to his being appellant's adviser and counselor, and the peculiar trust and confidence imposed in him; his kinship and profession; his advice to his niece not to pay the taxes; the appropriation of the crops and proceeds of the lands by Wooten, with the connivance of Kemp, for the purpose of preventing the payment of taxes by appellant; the circumstances and manner of securing title to the lands, and his absolute indifference to the wants and suffering of his sister after she had lost the land through his advice; as to the inference to be drawn by the division of the land between the Wootens and himself, two-thirds and one-third respectively, and the inferences to be drawn from the cost of each, viz., \$690 and \$210 respectively, of lands worth \$4,000 and \$2,000, tending to show a concert of action and the fact of a conspiracy as charged; as to the taking of the mortgage and note from the post-office, and their concealment by Wooten; as to the acts of trespass charged in the complaint as committed for the purpose of ousting her from the possession of the land reserved to her in the Macy deed, in pursuance of and as a part of the conspiracy, and the damages thereby to appellant; as to appellees' knowledge that appellant was an old woman, a widow, infirm by reason of her age and ill health, inexperienced in business affairs, ignorant of the law concerning her rights, incapable of attending to her affairs, and in a helpless condition; as to the date when appellant found the mortgage and note as fixing the time of the discovery of the fraud charged. While some of the matters last above referred to, and upon which there are no findings, may seem trivial, yet they are all charged in the complaint, they were before the jury, and they are before us.

The question of the sufficiency of the pleadings is not presented, but, for the purpose of the particular question

now under review, they are to be considered as presenting the issues tried by the jury, and the jury's conclusion thereon is expressed by their general verdict, presumably supported by evidence legitimately admissible under such issues. *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512; *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662; *Shoner v. Pennsylvania Co.* (1892), 130 Ind. 170; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139, 14 L. R. A. 733; *Union Traction Co. v. Barnett* (1903), 31 Ind. App. 467; *Union Traction Co. v. Vandercook* (1904), 32 Ind. App. 621. Therefore, if, by adding to the special findings facts which might have been proved under the issues, irreconcilable conflict is avoided between such special facts and the general verdict, it follows that the court below erred in sustaining the motion as to William Wooten and Kemp. *Indiana Pipe Line, etc., Co. v. Neusbaum* (1899), 21 Ind. App. 361.

But conceding to appellees that all representations made by Kemp in regard to taxes were not as to matters of fact,

but as to questions of law, for which an action at law will not lie, and that these allegations should be eliminated, still there remains in the complaint allegations of facts sufficient, if proved, and not contradicted by the answers to interrogatories, to avoid the conflict and uphold the general verdict.

In our opinion, where an old lady, shown to be infirm, helpless and incapable of attending to her affairs, looks to

her brother, a minister of the Gospel and a man of good business qualifications, successful in accumulating wealth, for counsel and advice, and he, knowing her condition, and for the purpose of cheating and defrauding her, enters into a conspiracy whereby, with his knowledge and consent, her property is consumed and such party rendered unable to pay her taxes, and by reason thereof she loses

her property, to the financial gain of such conspirators, and in continuation of such fraudulent purpose and during the existence of the trust and confidence, as here shown to exist, continued acts of trespass and damage are committed, as charged in the complaint, by one of the conspirators, and with the knowledge and consent of the other, then acting as her adviser, and for the purpose charged, actionable fraud is shown. Appellees also insist that the oral agreement between Macy and appellant, by which Macy was to transfer his tax lien to appellant, comes within the statute of frauds, and can serve no purpose in sustaining the judgment, for the reason that it was not enforceable against Macy; and, his grantee being a privy in estate, it cannot be enforced against him. This contention might be worthy of careful consideration if this were an action seeking to enforce an interest in the lands based upon such agreement, but as it is not, appellees' insistence is not well founded.

The date when appellant discovered the fraud in the complaint averred is not therein stated, but, as to appellees' answer tendering the issue of the statute of

9. limitations, the general verdict amounted to a finding in appellant's favor upon that issue, and as there are no special findings contradicting the presumption in favor of the general verdict, on this subject it must control.

Therefore, from the entire record in this case we conclude that the judgment should be and is affirmed as to Susie A. Wooten, and reversed as to William Wooten and Benjamin F. Kemp, with directions to the trial court to overrule their separate motions for judgment on the answers to the interrogatories, and render judgment against them on the general verdict.

COLLIER SHOVEL & STAMPING COMPANY ET AL.
v. CITY OF WASHINGTON.

[No. 5,122. Filed November 14, 1905. Rehearing denied March 16, 1906. Transfer denied June 21, 1906.]

1. **TAXATION.—Funds.—Use of.—Private Purposes.**—Taxes cannot be levied and used for private purposes. p. 373.
2. **MUNICIPAL CORPORATIONS.—Taxation.—Aids to Manufactories.**—Municipal corporations have no power to levy taxes and use same for aiding manufactories. p. 373.
3. **CONTRACTS.—Municipal Corporations.—Aids to Private Enterprises.—Bonds to Repay on Default of Conditions.**—A bond given to reimburse a town for the failure of a manufacturing company to locate and run its factory for a certain time in consideration of a bonus paid by such town is void and unenforceable. p. 374.
4. **SAME.—Illegal.—Protection of One Party.—Enforcement.**—Where contracts are declared illegal, and the purpose is simply to protect one of the parties, courts may grant relief or even enforce the agreement at the suit of the party to be protected. p. 374.
5. **MUNICIPAL CORPORATIONS.—Taxes.—Use of.—Public Policy.**—The public policy requiring contracts by municipal corporations to grant bonuses to private industries to be held void lies in the protection of such corporations' funds, and the courts will not enforce bonds for the performance of such contracts when to do so would endanger such funds. p. 375.
6. **SAME.—Bonuses to Private Enterprises.—Recovery of.—Contracts.**—While a municipal corporation cannot enforce a bond for the return of money given to a private company as a bonus for the establishment of a private enterprise, it may recover money thus unlawfully paid out. p. 375.

From Pike Circuit Court; *E. A. Ely*, Judge.

Action by the City of Washington against the Collier Shovel & Stamping Company and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

Herod & Thompson, Padgett & Padgett and Hugh D. Merrifield, for appellants.

J. H. O'Neill and M. G. O'Neill, for appellee.

Collier Shovel, etc., Co. v. City of Washington—38 Ind. App. 370.

Roby, J.—The Collier Shovel & Stamping Company, Austin F. Cabel, and Richard C. Davis, on March 29, 1901, executed to appellee their bond in the penal sum of \$2,500, conditioned as follows:

“The conditions of the above obligations are such that whereas the above corporation and the city of Washington have entered into a written agreement in duplicate whereby said corporation has undertaken to perform the stipulation and agreement in said undertaking set forth: Now if said corporation well and faithfully fulfills its said agreement and undertaking, then this obligation to be void, else to remain in full force and virtue in law.”

By the contract referred to the shovel company agreed to construct a plant for the manufacture of shovels, shovel handles and pressed-steel work at the city of Washington, employing therein fifty people at the start, and 150 when in full operation, to keep said plant running for at least ten years, not to sell to any trust, and not to sell to any one unless the purchaser assumed all its obligations. The breach averred is that said Collier Shovel & Stamping Company ceased to operate its plant in September, 1901, and since said time has failed to operate its plant; that the stockholders sold out all the machinery connected with said plant and all its property used in connection therewith, and all other property owned by it was by agreement withdrawn and refunded to the stockholders, since which time there has been no property belonging to said company, and it has ceased to do business.

Appellant shovel company answered by a general denial, and in a second paragraph set up the agreement substantially as is done by the plaintiff, averring further, a sale of said plant to a corporation of Hammond, and the performance of all the terms and conditions of said contract by said purchasing corporation at said town of Hammond. A demurrer was sustained to this answer, and, in view of

the fact that the central purpose of the contract was to procure the erection and operation of the plant at Washington, the correctness of such ruling is manifest.

The evidence shows that appellee is a municipal corporation of this State; that the shovel company was a private corporation; that the common council of the appellee corporation appropriated and paid to the shovel company \$2,500 of the public funds, which fund formed the consideration for the contract, failure to perform which is alleged as the breach of the bond sued upon. The terms of said contract relative to said money, and the payment and repayment thereof, are as follows:

“And whereas the city of Washington, by its common council, duly accepted said proposition on condition that said company when started in business would keep its plant running for at least ten years as contemplated by said proposition, and would not sell to any trust whatsoever, and would not sell to any one unless the purchaser would assume all obligations of the party of the first part: And on further consideration that said company would give to the party of the second part a bond with good and sufficient sureties to secure the faithful performance of its obligations to the city, and agreed to place in the hands, and did place in the hands, of John T. Neal \$2,500 as evidence of good faith, to be by him held in trust until said company should complete its plant and start in business; and whereas said company has its plant completed and has now started in business: Now, therefore, it is agreed that said John T. Neal is requested to turn said money over to said company to be used by said company without interest for the period of ten years, or for such period as said company shall fully comply with the conditions of this agreement, and in the event said company shall faithfully carry out its agreement for the full period of ten years, then said money is to become the money of said company without any further claims of the city thereto. But in the event that said company shall fail fully to carry out its undertakings for the full period of ten years,

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then from the time of such failures said \$2,500, with interest from the date of such failure, shall be due from said company to said city, and shall be payable without relief from the valuation and appraisalment laws of the State of Indiana."

The cause was tried without a jury, a finding made in favor of appellee, and judgment rendered thereon for \$2,726.20. Appellants' motion for a new trial was overruled, and the action of the court therein, as well as in overruling the demurrers to the complaint, is assigned for error.

Appellee's right to recover, in any event, depends upon the validity of this contract; the action being expressly founded upon it. Funds raised by taxation cannot

1. be applied to private uses. The very essence of the right of government to levy a tax lies in the public nature of the use to be made of the moneys thus collected. *McClelland v. State, ex rel.* (1894), 138 Ind. 321; *Parkersburg v. Brown* (1882), 106 U. S. 487, 27 L. Ed. 238, 1 Sup. Ct. 442; Cooley, Const. Lim. (7th ed.), 184, 243, 678.

There have been many attempts made to appropriate public funds for the encouragement of manufactories, but the power to do so has been universally denied. The

2. benefit resulting to the local public of a town by the establishment of manufactories is not different in kind from the benefit to such public arising from the establishment and operation of grocery stores. The manufacturer, the merchant, the mechanic and the laborer are equal promoters of the public good, and equally entitled to public aid. No line can be drawn in favor of one of them to the exclusion of the others, and a recognition of the right thus to distribute money, procured by taxation would subject the municipalities to importunities and impositions innumerable. *Citizens Sav., etc., Assn. v. City of Topeka* (1874), 86 U. S. 655, 22 L. Ed. 455; *Cole v. Lagrange* (1884), 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896;

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Sutherland-Innes Co. v. Village of Elvart (1898), 86 Fed. 597, 601, 30 C. C. A. 305; *Feldman & Co. v. City Council* (1884), 23 S. C. 57, 63, 55 Am. Rep. 6; *Dodge v. Mission Tp.* (1901), 107 Fed. 827, 831, 46 C. C. A. 661, 54 L. R. A. 242.

The contract sued upon is not *ultra vires*, but it is void as against public policy. *Elkhart County Lodge v. Crary* (1884), 98 Ind. 238, 49 Am. Rep. 746; *Brown v.*

3. *First Nat. Bank* (1894), 137 Ind. 655, 24 L. R. A. 206; *Greenhood, Public Policy*, 35. A contract void as against public policy stands upon the same footing as one made in contravention of the statute. *Franklin Nat. Bank v. Whitehead* (1898), 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. 302; *Winchester Electric Light Co. v. Veal* (1896), 145 Ind. 506; *State Bank v. Coquillard* (1855), 6 Ind. 232.

To the general rule of invalidity, which is presumed when the statute is silent and contains nothing from which the contrary can be properly inferred, there is a

4. well-settled exception. Sometimes contracts are prohibited for the protection of one of the parties, and "whenever a case falls within the limitation, and not within the general rule, the court may give relief against the improper transaction, or may even enforce the obligation arising from the tainted agreement, at the suit of one of the parties thereto." *Pomeroy, Eq. Jurisp.* (3d ed.), §403. This is but an expression of the maxim that "the law ceases with the reason thereof." *Deming v. State, ex rel.* (1864), 23 Ind. 416; *Harris v. Runnels* (1851), 12 How. 79, 13 L. Ed. 901; *Scotten v. State, ex rel.* (1875), 51 Ind. 52; *Walter A. Wood, etc., Machine Co. v. Caldwell* (1876), 54 Ind. 270, 276, 23 Am. Rep. 641; *New England, etc., Ins. Co. v. Robinson* (1865), 25 Ind. 536; *State, ex rel., v. Levi* (1884), 99 Ind. 77; *Wabash R. Co. v. Kelley* (1899), 153 Ind. 119.

The essence of the policy, which requires contracts for the application of public funds to private purposes to be held void, lies in the protection of such fund.

5. *Winchester Electric Light Co. v. Veal, supra; Armstrong v. State* (1896), 145 Ind. 609. If to deny recovery upon the contract in this case is to go counter to the purposes for the bringing about of which the invalidity of such contracts is declared, then such holding should not be made. In other words, if the reason ceases the law ceases with it.

The right of the city to protect itself against the unlawful depletion of its funds is undoubted, but it is not essential to such end that the validity of the contract

6. sued upon be asserted; while, if the city may recover upon contracts of this nature, the doctrine denying the right thus to contract becomes at once a mere platitude, and every practical obstacle to the loaning of credit by municipalities to private enterprises of every sort is removed. The reason of the law therefore impels us to hold that the contract sued upon is void. Being void, a judgment based upon it will have to be vacated.

Judgment is reversed, and cause remanded, with instructions to sustain appellants' demurrer to the complaint and for further proceedings consistent herewith.

[INLOW ET AL. v. HUGHES ET AL.

[No. 5,422. Filed January 24, 1906. Rehearing denied April 27, 1906. Transfer denied June 21, 1906.]

1. EVIDENCE.—*Lost Wills.—Probate.—Post-Testamentary Declarations of Testator.*—The post-testamentary declarations of a testator are admissible, in a suit for the establishment and probate of an alleged lost or destroyed will, to corroborate the testimony of other witnesses testifying to the contents of such lost or destroyed will. p. 381.
2. WILLS.—*Lost or Destroyed.—Probate.—Witnesses.—Statutes.—Evidence.*—Under §2779 Burns 1901, §2609 R. S. 1881, the establishment and probate of an alleged lost or destroyed will

requires the testimony of two witnesses to the provisions thereof, the testimony of the attorney drafting such will supported by the testimony of the principal devisee substantiating only a part of the provisions of same being insufficient to establish the whole of such will, and post-testamentary declarations of the testator are not sufficient to supply the necessary testimony of the other witness to such provisions, as required by such statute. p. 390.

From Montgomery Circuit Court; *Jere West*, Judge.

Suit by Charles W. Hughes and others against Rebecca Inlow and others. From a decree for plaintiffs, defendants appeal. *Reversed*.

Crane & McCabe, Clyde H. Jones and John Murphy, for appellants.

M. M. Bachelder, for appellees.

BLACK, P. J.—This was a suit for the establishment and probate of the alleged lost or destroyed last will and testament of James L. Wilson, deceased, and for permission for the executor named therein to qualify and enter upon the duties of such trust. The proceeding was brought by the devisee and certain legatees and the person so named as executor, who, with such person in the character of executor, are the appellees; the defendants, who are appellants herein, being the heirs at law of the testator and other legatees.

The complaint was in two paragraphs; the first proceeding upon the theory that the will had been lost or destroyed since the death of the testator, and the second alleging that a short time before his death he destroyed the will, and that when he did so he was of unsound mind and not capable of revoking his will, and that during all the time from the destruction of the will to his death he was of unsound mind. It was alleged in each paragraph that the plaintiffs were unable to state the provisions and terms of the will in the exact language used therein; but what was stated to be the substance thereof, so far as could be ascertained, was set out in the pleading.

Issues formed by answers of general denial were made, and the court rendered a special finding of facts. The will was adjudged established and proved, and thereafter the person named therein as executor qualified as such.

It was specially found by the court, among other things, that the terms and provisions of the will, executed by the testator October 18, 1897, were in substance as follows:

"I give and devise to C. W. Hughes the place where I now live, being all the real estate that I now own, to have and hold the same during his lifetime, he having the right to dispose of or sell the same at any time he may see fit. In case the same is not disposed of by said C. W. Hughes during his lifetime, then at the death of said C. W. Hughes said real estate shall go to the children of said C. W. Hughes: Provided said C. W. Hughes shall not bring any claim against my estate after my death for services and support rendered. After the payment of the above legacy, I give and devise \$500 to Eliza Standiford and \$500 to Mary Standiford; and after said legacies are paid in full I give and devise to Sallie Elliott, wife of James Elliott, \$250, and to Catherine Elliott \$250; and after said legacies are paid in full I give and devise to Armilda Patterson \$150 and to the Methodist Episcopal Church \$150; and that James Standiford be executor of this my last will."

It was further found that the part of the will which used the words "C. W. Hughes" was intended by the testator to mean and refer to Charles W. Hughes, a plaintiff in this case, and that "all that part of the will which reads 'to have and hold the same during his lifetime, he having the right to dispose of or sell the same at any time he may see fit. In case the same is not disposed of by said C. W. Hughes during his lifetime, then at the death of said C. W. Hughes said real estate shall go to the children of said C. W. Hughes: Provided said C. W. Hughes shall not bring any claim against my estate after my death for services and support rendered,' has only been proved by one

witness." In the judgment, the will thereby established was set forth as in the finding, including the part thereof so found to have only been proved by one witness.

Mr. Wilson, October 18, 1897, duly executed a will, the last will he was shown to have executed. This was satisfactorily proved by the testimony of the two subscribing witnesses, who knew nothing of the provisions of the will, which was written for the testator by another person, an attorney at law. The testator died April 23, 1902, in Montgomery county, Indiana, at the age of eighty-seven years and two months. There was evidence, which the trial court regarded as sufficient, tracing this will to the possession of the testator a short time before his death. This will was not found after his death, although there was diligent search for a will. There was no evidence directly showing its destruction, or what became of it. There was evidence having a tendency to show a favorable disposition of the testator toward the beneficiaries in the will as found by the court and stated in the judgment, and an unfavorable disposition toward the wife of Mr. Hughes; and there was evidence relating to the question of the soundness of the testator's mind at and after the time the will so came into his possession shortly before his death, from which the court concluded that he was then, and thereafter until his death, of unsound mind. Charles W. Hughes mentioned in the finding was not a relative of the testator, but had lived with him from early childhood, had married, and still continued, with his wife and children, to live with the testator in the residence owned by the latter, who left no children and no widow surviving him, his wife having died in 1893. The other appellees are kindred of the deceased wife of the testator; and the appellants, except the Methodist Episcopal Church, are kindred of the testator. We will assume for the purposes of this decision that, if the contents of the will as so found were sufficiently proved by competent evidence, the evidence as

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a whole was sufficient for the establishing of this will, and that, upon such hypothesis, if any errors occurred in the admission of the evidence, they were not of sufficient importance to warrant a reversal of the judgment. It will be understood that we direct our decision to the question as to the proof of the provisions of the will. No copy of the will was shown, and no draft or written direction from the testator was introduced. Mr. Batchelder, an attorney at law, testified that he wrote the will for the testator. He could not give the date nearer than within two months of the writing of the will, which was written in the attorney's office in the presence of the testator. The directions of the testator to the draftsman were oral. He testified: "I wrote in the will that his just debts should first be paid by his executor; and next, that he willed and devised his place where he now lives, being all the real estate that he owned, to C. W. Hughes, to have and to hold during his lifetime; that he may have the right to dispose of or sell the same at any time he may see fit; in case the same was not disposed of by said C. W. Hughes during his lifetime, then at the death of said C. W. Hughes said real estate should go to the children of said C. W. Hughes. Provided, further, that said C. W. Hughes was not to bring in any claim against the testator's estate after his death for services and support rendered. The next provision in the will was, that, after paying the foregoing legacy, he willed \$500 to Mary Standiford and \$500 to Eliza Standiford. The next item provided, that after paying the foregoing legacies in full he willed \$500—\$250 to one Elliott woman and \$250 to another Elliott woman. I do not remember their first names. I think though it was Sallie and Catherine. That, after paying the foregoing legacies, in the next item he willed \$250 to a woman by the name of Patterson; and in the next item he willed, after the paying of the foregoing legacies, I think it was \$50 to the Methodist Episcopal Church; and in the next item, after paying all the fore-

going legacies, if there was any property left, the remainder should go to C. W. Hughes. The next item, I think it was, provided that James Standiford should be the executor of this, his last will and testament. The starting out of the will ran in the usual form; that he executed this, his last will and testament, and hereby revoked all former wills by him made. That was in the preamble of the will. That is about the words and substance of the contents of the will, as near as I can come to it." He testified that after the execution of the will he handed it to Mr. Wilson and never saw it afterward. He had no memorandum with which to refresh his memory as to the contents of the will or the conversation with the testator.

The court caused the record to show that the court called Charles W. Hughes as a witness, under §510 Burns 1901, §502 R. S. 1881, and asked him to state whether, after October 1, 1897, he read a paper purporting to be the will of James L. Wilson. The witness answered that he did. The court by another question elicited the statement that the will was signed by the persons who had witnessed the execution of the will in question. The court to the witness: "If that will contained any provisions other than the provisions relative to yourself, state what they were. A. Yes, it gave Eliza Standiford and Mary, her daughter; first gave Eliza Standiford \$500 and Mary Standiford, her daughter, \$500; then, after the residue—I cannot use the legal language, but the meaning was, after that was paid, there was Sallie Elliott, the wife of James Elliott, and Catherine Elliott was to get \$250 each. Then, if there was anything left, Armilda Patterson, of Iowa, was to get \$150, and the Methodist Church \$150. Then if there was any residue—" The court: "I do not want anything concerning yourself." Witness: "You want to know who the executors were?" The court: "No, that is all I want to ask you."

It is claimed on behalf of the appellants that there was no evidence of the provisions of the will other than that furnished by the testimony of these two witnesses.

1. The appellees claim that the testimony of Mary E.

Ragstle, Henry Miller and Paul P. McGinnis supplied the additional needed evidence as to the provision of the will for Charles W. Hughes. Mary E. Ragstle had known the testator for many years, and at various times had worked for his family at his home. She testified concerning a conversation which she had with the testator, when she was staying with his family, about September, 1900; that he said, that if a man and wife would live together for some time and accumulate "a right smart," he always felt that it was right for the wife's people to have a part. "He talked so much about this Mary Standiford having part. I said: 'What are you going to do for Will? Ain't you done nothing for him?' He said: 'O, yes. I intend for him to have the home place. I have fixed it for him to have the home place.'" "Do you know what home place he alluded to? A. It was where I was staying then. He was in the home place."

The witness testified that the testator had many conversations with her after that respecting his leaving his property; that she did not pay any attention to it, to recollect it exactly; that she recollected it, but could not call it over exactly, word for word. The court appears from the record to have admitted this evidence as bearing upon the question of insanity, expressing doubt as to its competency as evidence of the contents of the will.

Henry Miller, a nephew of Mr. Wilson's deceased wife, testified that he had a conversation with the testator since the year 1897; that the testator remarked that where there was a man and his wife, the only ones in the family, where the woman helped to make the property, he believed the property ought to be divided between the man's heirs and the heirs of his wife. He said it never looked fair that

the man's kin should have all of it, and the other side none. The witness said he had two conversations with the testator, both to the same effect; that he never referred to Mr. Hughes. Paul P. McGinnis testified concerning a conversation in 1898 or 1899 between him and the testator at the home of the witness, "in which it came up about Mr. Hughes and also his wife, and he stated that Will had been kind of reckless, like some of the rest of the young fellows; that he did not suppose he was any worse than other young fellows; that he intended to do the right thing with Will, but did not like his wife much."

Upon the question whether evidence of the declarations of an alleged testator, made after the execution of the will, as to its contents, the will not being produced, is admissible for the purpose of proving its contents, there has been much diversity of opinion. In *Doe v. Palmer* (1851), 16 Q. B. 747, it was said that such evidence was not admissible for such purpose. In the later case of *Quick v. Quick* (1864), 3 Sw. & Tr. 442, 10 L. T. Rep. (N. S.) 619, such evidence for such purpose was held not admissible. In *Sugden v. Lord St. Leonards* (1876), 1 P. D. 154, 34 L. T. Rep. (N. S.) 372, what was referred to as the dictum of Lord Campbell in *Doe v. Palmer*, *supra*, was disapproved, and *Quick v. Quick*, *supra*, was overruled. It is to be noticed that in *Sugden v. Lord St. Leonards*, *supra*, the paper admitted to probate as the will was a paper drawn up by Miss Sugden from her own knowledge of the contents of the will, as she testified, and though it was shown that in some minor respects, as to which she could not recollect, the paper was deficient, nothing but the contents of this paper was established as the will or a part thereof; also that the declarations of the testator made after the execution of the will were expressly held by Cockburn, C. J., delivering the principal opinion, to be admissible as corroborative evidence, in confirmation of Miss Sugden's statement, which it was said did not need any confirmation;

and Mellish, L. J., stated that, having read through the judgment from which the appeal was taken, he considered (as did also Jessel, M. R.) that the president of the probate division did not rely upon such evidence, and in the view of Mellish, L. J., it was not necessary to consider the question whether the subsequent declarations of the testator were admissible. Jessel, M. R., regarded the question as being whether the evidence of the person who had seen the will could be confirmed or corroborated by declarations of the testator. He said of such evidence, relating to a time before the execution of the will, that it is not strictly evidence of the contents of the instrument, because it is simply evidence of the intention of the person who afterward executes the instrument. "It is therefore," he said, "simply evidence of probability—no doubt of a high degree of probability in some cases and of a low degree of probability in others." He expressed the opinion that, irrespective of the post-testamentary declarations of the testator, there would be no ground for saying that there was not sufficient evidence to sustain the proof of the will in question.

Mellish, L. J., also said: "When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the testator's declarations as to what he intended to put in his will, made either contemporaneously with or prior to the making of his will, are obviously evidence which corroborates the testimony as to what is contained in his will. But to my mind they do not of themselves prove what were the contents of the will; they corroborate the other evidence which has been given of the contents of the will. * * * But a declaration after he has made his will, in which he states what the contents of his will are, is not a statement of anything which is passing in his mind at the time, but it is simply a statement of a fact which took place, no doubt within his knowledge, and therefore you cannot

admit it unless you bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration."

When the necessities of the case of *Sugden v. Lord St. Leonards*, *supra*, as stated by the judges participating, are examined, and the use therein made of the post-testamentary declarations is considered, it must be admitted that the broad and general statement concerning such declarations in the opinion of the lord chief justice, often referred to and repeated by courts and text-writers, was not necessary to the decision, and therefore is the dictum of a very learned and eminent judge, upon which doubt has been cast not only by Mellish, L. J., in that case, but also by all the eminent judges delivering opinions in the house of lords, in *Woodward v. Goulstone* (1886), 11 App. Cas. 469; and the matter was left by the last-mentioned case an open question. The lord chancellor said: "As far as I am concerned, I desire to guard against its being supposed that I hold that these post-testamentary declarations are admissible." Lord Fitzgerald considered *Sugden v. Lord St. Leonards*, *supra*, as having reached the very verge of the law; and Lord Blackburn speaking of that case said: "Very considerable reasons have been given for doubting some of the propositions and doctrines laid down there, and they may be shaken to some extent."

The confidence in the reliability of such statements of a testator after the making of his will expressed by the very learned lord chief justice in *Sugden v. Lord St. Leonards*, *supra*, supposed to be justifiable perhaps in the particular case by reason of the esteem entertained by the members of the court for the testator, the first Baron St. Leonards, and Miss Sugden, does not appear to be shared generally by courts as a rule for guidance.

In the later opinion of Lord Herschell, L. C., in the house of lords, in the case of *Woodward v. Goulstone*, *supra*, it is said: "I think that common experience shows

that persons frequently allege that they have given benefits and made provisions for others after their death when those statements are absolutely without foundation, and are proved conclusively by the production of undoubted testamentary dispositions to have had no foundation. Nothing can be more dangerous, I think, than to accept as any evidence, to carry with it weight, of the contents of a will, the evidence of persons of statements made to them of bounties which they are to receive after the death of the person who made those statements." Very many expressions of like effect, and scarcely any to the contrary, may be found in the reports and text-books.

In the important and carefully-considered opinion in *McDonald v. McDonald* (1895), 142 Ind. 55, 83, it is said by the learned judge: "That the statements or declarations of a testator may be received in the absence of evidence of a higher character to prove the contents or provisions of a lost or destroyed will, finds support in the following English and American authorities cited." We have been interested in examining the decided cases thus cited, to one of which, *Sugden v. Lord St. Leonards*, *supra*, we have already referred at some length. For the purpose of illustrating the subject, though at the expense of some space, we will briefly notice the other cases.

Gould v. Lakes (1880), 6 P. D. 1, was held to be governed by the authority of *Sugden v. Lord St. Leonards*, *supra*. The will was in existence and was produced. The question was as to whether the several pieces of paper were brought together before the signing, and the evidence in question was held to be admissible to show that it was the intention of the testator to make dispositions in conformity with those found upon the several sheets.

In *Burls v. Burls* (1868), L. R. 1 P. & D. 472, a supposed draft of a lost will was proposed for probate. A number of witnesses who had read the will testified as to its contents, and it was held that the court should take the

parol evidence side by side with the draft and extract the substance of the will. There was no question concerning post-testamentary, oral declarations.

In the Goods of Barber (1866), L. R. 1 P. & D. 267, the contents of the will were shown by a draft and the testimony of witnesses who had seen the will or heard it read, proving that the will corresponded with the proposed draft.

In *Johnson v. Lyford* (1868), L. R. 1 P. & D. 546, evidence of verbal and written statements of the testator made in and about the making of his will and accompanying acts done by him concerning the same subject were held admissible as evidence of the contents of the will, which was lost; and the court pronounced intestacy. *Quick v. Quick, supra*, had been cited, against the evidence, but the court did not seem to regard it as in point.

In *Battyll v. Lyles* (1858), 4 Jur. N. S. 718, the sole question was, did any one other than the deceased knowingly destroy her last will.

In *Finch v. Finch* (1867), L. R. 1 P. & D. 371, the question for decision related to the question of revocation. The contents were proved by a draft, proved to be in the same words as the will, by an attesting witness, a law stationer, who prepared the will.

In *Davis v. Davis* (1824), 2 Addams Ecc. 223, there was evidence of the contents of the lost or destroyed codicil from a witness who had actually read it.

In *Keen v. Keen* (1873), L. R. 3 P. & D. 105, the only question raised was that of revocation—whether the will was destroyed by the testator with the intention of revoking it.

In re Page (1886), 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395, was a case where the attorney who drew up the lost will gave a copy of it in evidence, and the question was said to be whether the presumption that the testator revoked it was overcome by the evidence. Evidence was introduced

of post-testamentary declarations, some of which related to the provisions made by the will, in agreement with the copy, and the court on appeal held upon the evidence that the will was not revoked or canceled by the testator. In the course of the opinion it was said: "That the contents of a lost or destroyed will may be proved by the testimony of a single witness, is settled, in England, since the decision in the great case of *Sugden v. Lord St. Leonards* [1876], 1 P. D. 154, 34 L. T. Rep. (N. S.) 372. And like ruling has obtained in this country. *Dickey v. Malechi* [1839], 6 Mo. 177, 34 Am. Dec. 130. * * * *Sugden v. Lord St. Leonards*, *supra*, also holds that declarations, written or oral, made by a testator after the execution of his will, are, in the event of its loss, admissible, not only to prove that it has not been canceled, but also as secondary evidence of its contents. It has been held otherwise in New York, but this, in our opinion, is the more reasonable ruling." It is to be observed that the use made in *In re Page*, *supra*, of the testator's declarations was upon the question of revocation. In a note to this case in 59 Am. Rep. 395, 399, reference is made to a statement in Schouler, Wills, §403, that declarations of the testator are admissible to show the contents of a lost will; and it is pointed out that all the American cases cited by Mr. Schouler in support of this statement are only to the effect that such declarations are admissible on the subject of revocation, among these American cases being *Pickens v. Davis* (1883), 134 Mass. 252, 45 Am. Rep. 322, one of the cases cited in *McDonald v. McDonald*, *supra*.

In *Hope's Appeal* (1882), 48 Mich. 518, 12 N. W. 682, which was an appeal from the probate of a will, Mr. Wood, testifying for contestants, swore to the drawing and execution of a second will (which could not be found) and to the surrounding circumstances, and to the fact that it contained a clause of revocation. It was said of evidence offered by declarations of the testator shortly before his

death, that if admitted it would not be weighty, but would have tended to corroborate Wood, and for that purpose was admissible. Besides, it was said that evidence of the same nature offered later by the other side and tending against Wood's testimony was admitted, and the rulings on evidence, therefore, were irreconcilable.

In re Estate of Lambie (1893), 97 Mich. 49, 56 N. W. 223, was a case wherein it was held that the existence and contents of the lost will had been shown by the evidence of Francis Lambie, and that declarations of Mrs. Lambie (the testatrix) that she had changed her will previously made, and left all to her nephew when Francis should be through with it corroborated such testimony, and there was no error in admitting them; citing *Sugden v. Lord St. Leonards* (1876), 1 P. D. 154, 34 L. T. Rep. (N. S.) 372.

In *Foster's Appeal* (1878), 87 Pa. St. 67, 30 Am. Rep. 340, the contents of the lost will were clearly and fully proved by the testimony of two witnesses, as well as by memoranda in the testator's handwriting. The decision related in part to the force of the evidence introduced to rebut the presumption of revocation arising from the fact that the will was known to be in possession of the testator himself, and that it could not be found after his death; and it was also decided that the contents of a lost will may be proved by parol evidence.

In *Conoly v. Gayle* (1878), 61 Ala. 116, a copy of the will was in evidence.

In *McBeth v. McBeth* (1847), 11 Ala. 596, it was decided, adversely to the ruling on trial, that there was sufficient preliminary proof to permit the introduction of proof that a copy propounded was a substantial copy of the will.

In *Morris v. Swaney* (1872), 7 Heisk. 591, testimony of witnesses who had heard the will read was held admissible as furnishing evidence of its contents, in the absence of better evidence.

In *Reel v. Reel* (1821), 1 Hawks (N. C.) 248, 9 Am. Dec. 632, the declarations were held admissible as tending to show that the testator, whose will was produced, believed its contents to be different, for the purpose of proving fraud in the writer of the will, one of the executors and principal devisees.

In *Howell v. Barden* (1832), 3 Dev. (N. C.) 442, the question related to proof of post-testamentary declarations to show that the will was obtained by fraud and undue influence.

In *Simms v. Simms* (1845), 5 Ired. 684, the question was whether a certain paper, written in the handwriting of a decedent, was deposited by him among his valuable papers with the intention that it should be his will.

In *McDonald v. McDonald*, *supra*, there was no decision as to what effect the post-testamentary statements would have in a case such as the one before us. That was a case to set aside what was alleged to be a pretended will of Senator Joseph E. McDonald. The contestants were the appellees. They were not attempting to have any alleged will established and admitted to probate. It was claimed by them that his true will had been suppressed and destroyed without the testator's knowledge or consent, and that certain statements made by the testator, after the execution of the will, concerning its provisions, not in agreement with the alleged will attacked, were admissible, to rebut the presumption of revocation, and to show that the contestants were interested in the estate as devisees and legatees, that being the capacity in which they sued. It was held that evidence of the declarations were admissible for the purpose for which, as claimed by the contestants, it was introduced; the court at the same time saying that it was settled by some of the authorities cited that such statements of the testator should be received as evidence with great caution, for the reason that they are sometimes

made by him for the express purpose of misleading or satisfying curious friends or expectant relatives.

Our statute (§2779 Burns 1901, §2609 R. S. 1881) provides: "No will of any testator shall be allowed to be proven and established as lost or destroyed, unless

2. the same shall be proven to have been in existence at the time of the death of the testator; or be shown to have been destroyed in the lifetime of the testator without his consent, or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness." A similar statute, with some minor differences not here important, was enacted as section seventy-nine of our statute relating to wills, contained in R. S. 1843, p. 500. A similar statute was enacted in New York in 1830. See 2 R. S. of N. Y. 1852 (Denio and Tracy), p. 254, §88. See, also, Stevens' Ann. Code, p. 1936, §1865.

In *Harris v. Harris* (1863), 26 N. Y. 433, which was an action for partition of lands, where the provisions or contents of a will were proved distinctly by one witness, who drew it, at the request of the testator, and who was one of the subscribing witnesses to it, it was said that before the revised statutes, in such an action, evidence only of such an amount and degree was required as to the contents of the will as was necessary to establish any other fact in the action; that is to say, proof of the facts in issue by a single witness. It was held that the statutory requirements of two witnesses, or one witness and a copy, only applied in the direct proceeding under the statute for the purposes of probate and record of a will alleged to have been lost or destroyed, and were not designed as a general rule of evidence in all cases and in all tribunals where the execution and validity of a will, lost or destroyed by accident or design, should come in question; that the legislative intention to effect so radical a change in the common-law rules of evidence was not manifest.

In *Sheridan v. Houghton* (1879), 6 Abb. N. C. 234, where the two witnesses did not concur in their testimony as to some of the provisions found to be established by the surrogate, it was held that there was such a discrepancy in the evidence that the will could not be regarded as proved by two witnesses, as required by the statute.

In *McNally v. Brown* (1882), 5 Redf. Surr. 372, it was regarded as not necessary that the witnesses should remember the exact language used by the testator, but that they must be able to testify at least to the substance of the whole will, so that it could be incorporated with the decree, and it was considered that the two witnesses should prove all the provisions of the will as probated; citing *Sheridan v. Houghton, supra*.

In *Hatch v. Sigman* (1883), 1 Dem. Surr. 519, it was said, with reference to the statute, concerning declarations of the testator after the execution of the will alleged to have been lost, that while they are admissible, it is only as a circumstance to be taken in connection with other proof tending to establish a certain fact; that it would be rendering the strict language of the statute nugatory to say that declarations of the decedent, however lucid and precise they may be, however minutely they may detail the facts occurring at the execution of the will, and however numerous they may be, will establish the execution of the will and also be tantamount to the "two credible witnesses" made an indispensable necessity by the statute; that the declarations of deceased persons are always a dangerous kind of testimony, and are received and scanned with the closest scrutiny, and, in the usual run of cases tried in a surrogate's court, are not even admissible, except as bearing upon the testator's mental capacity; "and it would be a marvelous stretch of the judicial functions to say that the reiteration of these statements can galvanize them into the 'two credible witnesses' provided for by the statute."

Inlow v. Hughes—38 Ind. App. 375.

In *Colligan v. M'Kernan* (1884), 2 Dem. Surr. 421, a will was propounded for probate, and the question was whether there was sufficient evidence to reject it upon the ground that it had been effectually revoked by a later will. It was shown in the opinion of the court that the statutory provisions as to the particular kind of proof required for "establishing" a will had no application as to the later will in such a case, and that it was not necessary, in such a case, that two witnesses should testify as to the contents of the later will, nor was it necessary to show that it was still in existence at the testator's death, or that, if not then in existence, it had been fraudulently destroyed in his lifetime. It was held that parol evidence was admissible in such a case to show that a will was executed after the one propounded and that the later will contained a clause of revocation, and that, notwithstanding the statute, the existence of the revoking clause might be proved by the testimony of a single witness. The evidence in that case as to the existence of a revoking clause was held to be merely hearsay. See, also, *Collyer v. Collyer* (1886), 4 Dem. Surr. 53, 62. The case last cited was a proceeding to prove a will as lost or destroyed. Concerning the evidence of the provisions of the will, the court, after referring to the statute, said: "Mr. Parsons [a counsellor at law] produced the draft of the will made by him, which, he substantially testifies, was correctly engrossed by his clerk, and, so engrossed, was executed by the decedent. Hence that draft may be treated as a substitute for one of the two witnesses required by the statute. In no other way does he prove the provisions of the will. It is true, they were simple, devising and bequeathing all her estate, real and personal, to her brother George B. Collyer, the proponent, but that will not warrant the dispensing with the one witness which the statute requires besides the draft. If it did, then it would seem that, in all cases, the person verifying the draft or copy (and it would not be evidence without such verification), by

the very act of testifying to its correctness, would thereby become the needed witness. Such cannot fairly be considered the design of the provision. Another witness was required, to render the proof complete on this subject. Declarations of the decedent as to the contents and substance of the will are not available for such a purpose. The evidence must come from some person who has read, or heard read, the document. None was produced, and the proof, therefore, falls short of what the statute requires."

It may be again remarked that there is no question in the case before us respecting a draft or copy of the will.

Concerning the legitimate use of post-testamentary declarations, see, further, *Mercer v. Mackin* (1879), 77 Ky. 434, 447, where, upon an application for the probate of a writing as a lost will, it was said: "Evidence of declarations of the testator as to the contents of his will is only admissible in corroboration of other evidence, and, when there is no other evidence, his declarations should be rejected." See, also, *Chisholm v. Ben* (1847), 7 B. Mon. 408.

In the case at bar, the attorney who drew up the will testified as to its provisions. He was a competent witness for such purpose. *Kern v. Kern* (1900), 154 Ind. 29; *Towles v. McCurdy* (1904), 163 Ind. 12, 16; *Ford v. Teagle* (1878), 62 Ind. 61. When we look for the clear proof of the provisions by another witness, we observe that the learned court felt bound to state that some important provisions of the will, as found in another clause of the finding and as set forth in the judgment, were not proved by more than one witness. Mr. Hughes did not testify as to the devise, with the prohibition against the filing of claims by the devisee, or as to the residuary bequest, or as to the revocation of former wills, or as to the direction for the payment of debts by the executor, or as to the nomination of the executor, as to all of which the draftsman testified.

Mr. Hughes agreed in his testimony with the draftsman as to some of the legacies, but not as to others.

In the will as set out in the findings and in the judgment there is no residuary clause, no express revocation of former wills, no direction for the payment of debts by the executor. Assuming, as we may, that probate should not be denied merely because the court could not include these matters testified to by the draftsman alone and not found by the court, yet we observe disagreement between the witnesses as to some of the bequests. The court probably considered that one witness was more nearly correct than the other, as to bequests; but the statute requires that all the provisions of the will as established shall be clearly proved by two witnesses. The entire devise, with the prohibition against the filing of claims by the devisee, as set forth in the testimony of the draftsman, is included in the finding and the judgment. As to the provisions concerning which the court expressly stated that they were proved by only one witness, little need be said. Supposing, for the moment, that there was sufficient basis for the finding of a devise of a life estate, yet that portion which the court said was proved by only one witness materially qualified the devise of a life estate by providing for a right to dispose of or sell the real estate at any time as the devisee might see fit, and directing that if he should not dispose of it in his lifetime, the real estate should go to his children, not parties to this suit, and the devisee was restrained from bringing claims against the decedent's estate for service and support. The probating of these provisions was in the face of the statute.

We are next led to seek for the clear proof by another witness besides the draftsman of the devise of a life estate, and we discover that the only supposable reliance of the trial court was upon the testimony to which we have referred concerning oral statements of the testator made after the execution of the will. In the conversations with

Mr. Miller and Mr. McGinnis there was no statement of any definite testamentary provision. It is impossible to find in them anything that can be regarded as furnishing in themselves the proof which the statute requires of any actual provision of the will, supposing it possible to supply such proof by post-testamentary declarations. The testimony of Mrs. Ragstle seems to have been supposed to be sufficient to go with that of the draftsman to constitute the clear proof of two witnesses of a devise of a life estate. There is a striking contrast between the testimony of this witness and that of the learned and experienced lawyer, who testified clearly and definitely concerning the voluntary, earnest and impressive statements of his eminent law-partner in *McDonald v. McDonald*, *supra*, a case for which the statute here applicable did not furnish the rule of evidence. In the case before us the statements were not made voluntarily and spontaneously, but were drawn out by the inquiry of a curious domestic in the testator's service, who undertook to repeat them in evidence after a long lapse of time, who acknowledged her inability to remember all the language of the testator concerning the matter, none of which, as related, imported definitely a devise of a life estate, and of whom it may be said, without impeachment of her integrity, which we would not disparage, that her mental training was but slight. The testimony of all the witnesses concerning statements of the testator has the badges of unreliability, because of which the courts and the text-writers in general give emphatic warning against such evidence. Our statute should be regarded as a protection from such unsatisfactory evidence. While we are not prepared to say that we have authority to hold such evidence inadmissible upon the question of the provisions of a lost will, the only use of it which we are now considering, yet we feel constrained, and all the more in view of our statute, to regard it as only applicable if sufficiently definite, by way of corroboration in the furnishing of the

clear proof by two witnesses of the provisions of the will, as matters of fact within their knowledge, which is required by the statute. Only such provisions as are thus proved can be established as the lost will.

We must hold that the court's findings were not supported by sufficient evidence. Judgment reversed for a new trial.

BOND v. MAY.

[No. 5,787. Filed June 22, 1906.]

1. **PARTNERSHIP.**—*Accounting.*—*Recovery by Partner Without.*—One partner cannot recover from another any sum that may be due on account of partnership matters without an accounting. p. 398.
2. **ACCOUNTS.**—*Tenancy in Common.*—*Partnership.*—*Individual Debts.*—A tenant in common may sue his cotenant for an accounting and have a decree without taking into account a debt of such cotenant for which the tenant is surety, the fact that such tenants each assisted in the conduct of the farm and that after their division thereof one of them managed both farms, giving the other part of the net profits as rent, not constituting a genuine partnership. p. 399.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Suit by Peter May against Wilbur D. Bond. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Foltz & Spitler, for appellant.

Jesse E. Wilson, for appellee.

BLACK, J.—The appellee, who was the plaintiff, and the appellant, who was the defendant, in 1894, contracted with one Parkinson to purchase from him certain real estate, being two adjoining quarter sections of land in Jasper county; and Parkinson, in February, 1895, by his general warranty deed, conveyed the land to the appellee and the appellant as tenants in common, the purchase price being \$11,200. At and before this conveyance the grantees paid a part of the price, \$3,500, each paying an equal portion thereof, and they became jointly indebted to Parkin-

son for the remainder of the price, \$7,700, and they executed to him their mortgage therefor upon the half section. The appellee was the appellant's father-in-law, and they resided with their families in the same neighborhood in Illinois, and the appellee continued to reside there; but in the spring of the year 1895 the appellant removed with his family to the land so conveyed to him and the appellee, took possession of the half section, and continued to occupy and to use for agricultural purposes the two quarter sections for eight years thereafter. He brought with him certain agricultural implements and animals owned by him, and the appellee sent to the farm certain agricultural implements and animals owned by him, which were used upon the farm. In August, 1895, the appellant conveyed to the appellee the undivided one-half interest of the former in the western quarter section, and the appellee conveyed to the appellant the undivided one-half interest of the former in the adjoining eastern quarter section, each conveying for the expressed consideration of \$5,600, and the deed of conveyance to each being expressly made subject to the purchase-money mortgage to Parkinson, and each grantee by the terms of the deed of conveyance to him assuming and agreeing to pay, as part of the consideration for the real estate so conveyed to him, the one-half of said mortgage and the one-half of the purchase-money notes to Parkinson secured thereby. There was evidence from which it might have been found that the sum of \$6,000 of this balance of purchase money was paid in equal portions by the parties, and that the remainder thereof was paid by the appellant, who also paid the taxes on the two tracts while he continued to occupy and use the appellee's quarter section, and also paid the greater portion of the interest as it accrued upon the unpaid part of the purchase money; that the appellee paid a small portion of the interest, and furnished to the appellant, personally, certain definite sums of money.

After the land had been thus fully paid for, the appellant, who for eight years had resided with his family in a dwelling upon his own quarter section, using the other quarter section as a part of his farm, ceased to hold and use the quarter section so owned by the appellee, which thereupon was taken by its owner, who proceeded to erect a dwelling-house thereon, and thereafter this land was occupied and used by another son-in-law of the latter. At this time some of the animals and implements so furnished by the appellee were retaken by him.

This was a suit for an accounting and for the recovery of any balance found due the appellee, there being a counterclaim filed by the appellant. The court found there was due to the appellee from the appellant \$678, and that the latter should account to the former for that sum, and that such sum due the appellee from the appellant was wholly unpaid. As part of the finding, it was stated: "The court does not take into account any indebtedness that may be owing by the partnership, and does not decide any question concerning the same."

This statement in the finding furnishes the subject of the contention here. It is true, as suggested on behalf of the appellant, that one partner cannot maintain a

1. suit against his copartner to recover an alleged indebtedness of the latter to the former growing out of the partnership transactions, until the affairs of the partnership are closed up and its debts are paid. *Briggs v. Daugherty* (1874), 48 Ind. 247; *Lang v. Oppenheim* (1884), 96 Ind. 47; *Powell v. Bennett* (1892), 131 Ind. 465. A court will not ordinarily entertain matters relating to partnership accounts between partners, until by its judgment or decree a final adjustment of the partnership business can be effected. *Thompson v. Lowe* (1887), 111 Ind. 272. One partner may maintain a suit to compel an accounting and to recover such sum as may be found due him upon the final adjustment of the partnership affairs,

and if necessary for the accomplishment of such result a receiver may be appointed; but in such an action there cannot be a recovery in favor of one partner against the other upon a partial adjustment of the affairs of the partnership which leaves some of the partnership debts unpaid. See *Meredith v. Ewing* (1882), 85 Ind. 410; *Miller v. Rapp* (1893), 135 Ind. 614; *Adams v. Shewalter* (1894), 139 Ind. 178.

It is very difficult to ascertain from the record before us any definite terms or understanding of the parties upon which the land of the appellee was held and used

2. by the appellant. The evidence in this respect is obscure and somewhat contradictory. The parties appear therefrom to have been ignorant and unmethodical, and their intentions are indicated by their conduct more than by any expressions to each other shown in evidence. Perhaps their relationship and the fact that the daughter and grandchildren of the appellee were members of the appellant's family residing on the land contributed to the indefiniteness of the dealings of the parties with each other. A dwelling-house and some farm buildings were on the eastern quarter section, which in the voluntary partition was conveyed to the appellant, and he and his family resided there from the beginning of their occupancy; and it appears to have been agreed that, whenever the appellee should determine to build a residence on his own quarter section, the appellant should pay the appellee one-half the value of those improvements upon the land so owned originally by the parties as tenants in common; also, that the appellant and his family should have the right to consume and appropriate to their own use so much of the products of the land as might be needed for their subsistence, without any obligation to account therefor to the appellee; also, that the land originally held in cotenancy should be divided equally, each party owning in severalty one quarter section and paying the original grantor therefor one-half of the pur-

chase price of the whole half section; also, that the appellant should occupy and cultivate all the land and own its products and dispose thereof at his pleasure, and after providing for his family out of such products should apply the remaining surplus of the net income of the farm to the payment of the taxes thereon, including the taxes on the appellee's quarter section, and to the payment of the accruing interest upon the unpaid purchase money, for the payment of one-half of which, as between themselves, each was bound to the other, and also to the payment of unpaid principal; and that when the appellee should take over the possession and use of his separate portion of the land, the animals and utensils furnished by him should be restored to his possession. Whatever surplus of the net income was thus applied in payment of principal, interest and taxes was used for the equal benefit of each of the parties, and its payment in that manner amounted to an equal division of such surplus, which perhaps can scarcely be called the net profits of a business, especially in view of the use of an indefinite and varying portion of the income in the support of the appellant and his family. It seems to have been the intention of the parties that the appellee was entitled to have the one-half of such surplus applied to his benefit as compensation for the use of his portion of the land and of the use and enjoyment for the time being of his personal property, which continued to be owned by him individually. It seems to have been contemplated that such personal property should be returned or accounted for, and that one-half of the value of the improvements on appellant's quarter section, and one-half of any net surplus of income not paid out for the benefit of both parties as purchase money, interest and taxes should be accounted for; and that any sums of money furnished by the appellee to the appellant at the special instance and request of the latter for his individual uses should be repaid or accounted for. While the word "partnership" was used

somewhat frequently in the court below, especially on the part of the appellant, the relation of the parties to each other does not seem to be properly so characterized. Some of the appellee's demands were based upon his right to a portion of the surplus of the income of the farm; yet such portion was due him as compensation for the use and enjoyment of his property, rather than as a share of the net profits of the business of a partnership.

The indebtedness referred to in the finding was evidenced by two certain promissory notes, one dated December 23, 1899, for \$500, signed by the appellant and by the appellee, and one dated August 20, 1900, for \$1,000, signed by the appellant and his wife and by the appellee. These notes were payable to the appellant's father, and were given, the first for \$500 borrowed by the appellant from his father, at its date, the second for \$500 so borrowed at its date, and also in lieu of a note of the appellant alone theretofore given for \$500 previously borrowed by him of his father. The loans were made to the appellant individually. The notes were not signed in a firm name. There was no firm name, and there does not appear to have been any authority in either party to sign his own name as a firm name, or for or on behalf of both of the parties, or any intention to do so. Each signed as an individual, as and for himself alone. Each note was signed by the appellee some time after its execution, and, so far as appears in this case, without consideration. The money for which the notes were given did not become the property of the appellee, and he does not appear to have had any control over its disposition; and he testified that he did not know how it was used. It was owned and controlled by the appellant alone, who used it for various purposes, paying some of it upon the principal mortgage debt, some for interest thereon, some for taxes, some for cattle purchased by him alone, and some for wages of men who worked on the farm. Some payments were made by the appellant to his

father upon this indebtedness with money derived from profits from the land. If he used any part of this, his own money, for the benefit of the appellee, and not wholly for payment of his own portion of the joint debt, and thereby an obligation as to such part arose as between the parties, this would not render the notes evidences of partnership indebtedness to the payee thereof, in case it could be held that there was a partnership; this money in such case constituting capital paid in by the appellant. Considering the matter with reference to the actual relation of the parties, the appellee might be answerable to the appellant for some part of the money obtained and used for the benefit of the appellee to the extent that the appellant was not reimbursed therefor by and through the surplus of the net income retained by him. He would have to account for and pay to the appellee so much less of the surplus of the net income.

The court could properly regard the unpaid notes as having been given for money borrowed by the appellant alone for his own use, and therefore might properly hold, as it in effect did hold, that the outstanding notes ought not to be considered as entering into the account between the parties adjusted in this suit. The parties were not partners *inter se*, and they did not hold themselves out as such to the payee of the notes, which were not given nor received as the notes of a partnership. See *Hubbell v. Woolf* (1860), 15 Ind. 204; *Ditts v. Lonsdale* (1875), 49 Ind. 521.

To be a partner, one must have an interest with another in the profits of a business, as profits. There must be a voluntary contract to carry on a business with intention of the parties to share the profits as common owners thereof. A person who receives a share of the net profits of a business as compensation for services or in lieu of rent for the use of property, real or personal, is not thereby made a partner. See 22 Am. and Eng. Ency. Law (2d ed.), 36; *Macy v. Combs* (1861), 15 Ind. 469; *Emmons v. Newman*

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(1871), 38 Ind. 372; *Keiser v. State* (1877), 58 Ind. 379; *Bradley v. Ely* (1900), 24 Ind. App. 2, 79 Am. St. 251.

There were no special findings, properly so called, and the finding in which the remark above quoted occurs is to be considered as a general finding. Whether the remark of the court may properly be regarded as in itself presenting any question for decision we do not determine, but we have not been disposed to avoid the question discussed by counsel, and we conclude that the disposition of the cause as indicated by the remark so inserted in the finding was not materially erroneous, though the court below incorrectly adopted the term "partnership," loosely used in the course of the proceedings.

Judgment affirmed.

RUDISELL v. JENNINGS.

[No. 5,789. Filed May 15, 1906. Rehearing denied June 22, 1906.]

1. PLEADING.—*Complaint.*—*Jurisdiction of the Person.*—*Demurrer for Want of Facts.*—*Presumptions.*—A complaint on a note and for the foreclosure of a chattel mortgage recorded in J. county and showing that defendants at the time of its execution resided in J. county does not on its face show a want of jurisdiction over defendants as against a demurrer for want of facts, although such complaint fails to show that defendants were residents of B. county, in which the suit was brought, at the time of the filing thereof, there being a presumption of jurisdiction. p. 405.
2. CHATTEL MORTGAGES.—*Description of Property.*—*Indefinite.*—*Complaint.*—A chattel mortgage of "two Jersey cows, three and five years old; three work horses, age, eight years and nine years; one farm wagon," is good as between the parties; and a complaint for foreclosure specifically describing such property is not subject to a demurrer. pp. 406, 408.
3. PLEADING.—*Complaint.*—*Bills and Notes.*—*Chattel Mortgages.*—*Foreclosure.*—*Indefinite Description.*—A complaint on a note and for the foreclosure of a chattel mortgage is good, though the description of the mortgaged property be insufficient. p. 406.

4. JUDGMENT.—*Special Findings.—Conclusions of Law.—Bills and Notes.—Chattel Mortgages.—Husband and Wife.—Suretyship.*—Where the special findings show that the husband and wife executed their note and a chattel mortgage on certain articles to secure same; that the wife was surety only, and the conclusions of law were against the husband and in favor of the wife, the decree was correct. p. 406.
5. NEW TRIAL.—*Failure to Appoint Stenographer.*—The failure of the court to appoint an official stenographer to report the evidence in a cause is not a ground for a new trial where no request therefor was made. p. 407.
6. JUDGMENT.—*Motion to Modify.—Chattel Mortgages.—Foreclosure.—Indefinite Description.*—A motion to modify a judgment on a note and for foreclosure of a chattel mortgage by striking out the foreclosure decree should be overruled where the complaint specifically described the mortgaged property, although the mortgage did not, the rights of no innocent parties being involved. p. 408.
7. APPEAL AND ERROR.—*Briefs.—Waiver.*—A failure to discuss an alleged error is a waiver thereof. p. 408.
8. EVIDENCE.—*Chattel Mortgages.—Indefinite Description.—Identification.*—Parol evidence is admissible to identify the property covered by a chattel mortgage containing an indefinite description of property. p. 413.

From Brown Circuit Court; *W. J. Buckingham*, Judge.

Suit by Nathan M. Jennings against Bailey Rudisell and wife. From a decree for plaintiff, said Rudisell appeals. *Affirmed.*

L. E. Ritchey, for appellant.

E. F. Barker and B. F. Watson, for appellee.

WILEY, J.—Appellee sued appellant and his wife upon a promissory note and to foreclose a chattel mortgage given to secure its payment. The court made a special finding of facts and stated its conclusions of law thereon. By its conclusions of law the court held that appellant's wife was not liable, and rendered judgment in her favor for costs, and against appellant upon the note and to foreclose the mortgage as to all the property described therein, except two cows, which the court found belonged to appellant's wife.

Appellant moved for a *venire de novo*, for a new trial, and to modify the judgment, all of which motions were overruled. The errors assigned are the overruling of the demurrer to the complaint and the overruling of the three motions to which we have just referred.

Two objections are urged to the complaint: (1) Because it shows upon its face that the court did not have jurisdiction of the parties defendant; (2) the description of the mortgaged property was insufficient.

The mortgage which is filed as an exhibit to the complaint shows that the mortgagors at the time of its execution were residents of Johnson county, Indiana, and

1. that the mortgage was recorded in that county. The suit was brought in Brown county, and there is no averment in the complaint that the mortgagors, at the time of the commencement of the action, resided in that county. The ground of the demurrer was that the complaint did not state facts sufficient to constitute a cause of action. A circuit court is a court of general jurisdiction, and it is only when the want of jurisdiction appears on the face of the complaint that a demurrer will lie. In actions in such a court it is not necessary that the complaint should affirmatively show that the court has jurisdiction. If there is nothing in the complaint to show whether the court has or has not jurisdiction, the question cannot be raised by demurrer, as the jurisdiction will be presumed. *Brownfield v. Weicht* (1857), 9 Ind. 394; *Ragan v. Haynes* (1858), 10 Ind. 348; *Godfrey v. Godfrey* (1861), 17 Ind. 6, 79 Am. Dec. 448; *Board, etc., v. Tichenor* (1891), 129 Ind. 562; 1 Works' Practice (3d ed.), §474; *Kinnaman v. Kinnaman* (1880), 71 Ind. 417; *Chapell v. Shuee* (1889), 117 Ind. 481. It does not appear from the face of the complaint that the Brown Circuit Court was without jurisdiction, and, this being true, appellant could not question the jurisdiction, except by answer. *Eel River R. Co. v. State, ex rel.* (1896), 143 Ind. 231. Under these authorities it

must be held that the court correctly overruled the demurrer to the complaint.

The property embraced in the mortgage is described as follows: "Two Jersey cows, three and five years old; three work horses, age, eight years and nine years; one

2. farm wagon." The complaint specifically describes the property, and avers that it was the only property of its character owned by the mortgagors. It is further averred that the mortgagors still own said property and are in possession of it. It is laid down in 1 Cobbey, Chattel Mortgages, §188, that "the general rule seems to be that, as between the parties, any description is good, if the parties at the time knew and understood what the mortgage covered." This rule is approved by the Supreme Court in *Baldwin v. Boyce* (1898), 152 Ind. 46. 3 Am. and Eng. Ency. Law, 181.

It has been held that a complaint upon a note and to foreclose a mortgage is good on demurrer, even though the description of the property in the mortgage is in-

3. sufficient. *Bayless v. Glenn* (1880), 72 Ind. 5.

Our conclusion is, therefore, that there is no merit in appellant's contention that the complaint is bad because of an insufficient description of the property.

This brings us to the special finding of facts and conclusions of law. The court found that appellant and his wife executed the note and mortgage in suit, and that the

4. mortgage was duly recorded in Johnson county, Indiana, where the mortgagors at the time resided; that the mortgagors were husband and wife; that the two cows mentioned in the mortgage were the separate property of the wife; that all the other property named therein belonged to appellant, and that he was still in possession of it; that appellant's wife executed said note and mortgage as surety for her husband, and that there was due on the note \$291, principal, interest and attorneys' fees. The conclusions of law are: (1) That Martha Rudisell, one of

the defendants below, was not bound for the payment of said note; (2) that the mortgage is not a lien against the two cows; (3) that appellee was entitled to recover from appellant the amount due upon the note; (4) that the mortgage should be foreclosed; (5) that Martha Rudisell should recover her costs. The evidence is not in the record, and no attempt has been made to bring the evidence to this court. Upon the finding of facts and the conclusions of law the judgment is correct. As the evidence is not in the record, the reasons stated by appellant in his motion for a new trial, depending upon the evidence, cannot be considered.

One of the reasons for a new trial assigned in the motion is that the court "caused said trial to proceed without any official court reporter or other reporter being pres-

5. ent to take down the testimony." So far as the record shows, appellant did not, before the trial commenced, or during its progress, make any request that a reporter be appointed to take down in shorthand the evidence, and the first time the question was presented to the trial court was in the motion for a new trial. Counsel for appellant, in his brief, asserts that it is the duty of the court to appoint an official reporter "to take down the evidence in all cases, and this is mandatory." Counsel has evidently taken an erroneous view of the statute, for while it is the duty of the trial judge to appoint an official reporter, such reporter is only required to take down the evidence in shorthand when directed to do so by the judge. §1470 Burns 1901, Acts 1899, p. 384. If appellant, before entering upon the trial of the cause, had requested the court to appoint an official reporter to take down the evidence in shorthand, and the court had denied such request, he might have had some ground of complaint. But under the facts as disclosed by the record the court committed no error in this regard, and its failure to appoint such reporter

was not a valid reason to be assigned in a motion for a new trial.

Appellant's motion to modify the judgment goes to that part of it decreeing the foreclosure of the mortgage. The

motion is based upon the proposition that, because

6. of the insufficiency of the description of the mortgaged property, foreclosure could not be decreed.

We have settled this question by what we have said in regard to the sufficiency of the complaint.

Appellant has not discussed the overruling of his

7. motion for a *venire de novo*, and it is therefore waived.

Judgment affirmed.

ON PETITION FOR REHEARING.

WILEY, J.—Appellant has petitioned for a rehearing, and has assigned four reasons therefor, but they may all be grouped and considered under the single proposition

2. which is urged by appellant, that the description of the property in the mortgage is too indefinite and uncertain, even as between the parties, to constitute a valid contract. The original opinion contains the following sentence: "The complaint specifically describes the property, and avers that it was the only property of its character owned by the mortgagors." This expression is not wholly correct, and it is due to appellant that the facts as pleaded should be correctly stated. It is averred that "said cows and said wagon being the only cows and only new wagon owned by and in possession of said defendants on the day of the execution of said mortgage." The complaint further avers: "That the property described herein is identical with and the same property as described in said mortgage." Omitting the description of the cows, the remainder of the mortgaged property is described in the complaint as follows: "Three work horses, one of which is gray in color, eight years old and named Joe; one of which is black in

color, nine years old and named Daisy; one of which is black in color, nine years old, and named Dolly. Also one heavy, broad-tread farm wagon."

In the brief in support of the petition for a rehearing counsel for appellant admits that "the questions decided in the opinion are correctly decided, except the one proposition: Was the complaint sufficient to warrant a decree of foreclosure as to the three work horses described in the mortgage, and attempted to be described in the complaint?" As between appellee and an innocent third party it may be conceded that the description of the horses, as stated in the mortgage, unaided, is too indefinite and uncertain, and would render the mortgage invalid. But no question of an innocent third party is presented by this appeal. The rights of the parties are to be determined upon the proposition that they are the original contracting parties. If they knew and understood what specific property was intended to be mortgaged, and a part of such property was not properly described, under proper averments of the complaint parol evidence would be admissible in aid of the description, and the mortgage would not be void, as between the parties, for uncertainty.

As already indicated, the property intended to be mortgaged is specifically described in the complaint. Finding number six is as follows: "That the horses covered by said mortgage were one black mare named Daisy, and one black mare named Dolly, and one gray horse named Joe, each one being nine years old, and being the property of and in the possession of the defendant Bailey Rudisell at the time of the execution of the mortgage and now in the possession of said defendant," etc. It thus appears that the specific property intended to be mortgaged is described in the complaint and finding, and there is no doubt but that the decree covers that property. No rights of third parties have intervened. Who then is harmed by an imperfect description of the property in the mortgage? Certainly

not appellant, for the very property he pledged to secure his debt is made subject to sale by the decree to satisfy the debt.

It is urged that the description of the horses in the mortgage is insufficient, because it does not appear that the mortgagor had no horses of a like character, not included in the mortgage. 1 Cobbey, Chattel Mortgages, §186, states the rule as follows: "Only a party whose rights are injuriously affected by the mortgage can raise the objection of insufficient description of the property. A mortgage may be void as against *bona fide* creditors of, or purchasers from, the mortgagor, for defective description of the property mortgaged, and yet good as between the parties to the mortgage, especially where the property included in the mortgage is identified by them. As between them, a specific and particular description of the several articles mortgaged, from which to identify them from other like articles of the mortgagor in the same collection, is not essential to the validity of the mortgage. A mortgage which is so indefinite as to the description of property that the record thereof would not constitute sufficient notice to a purchaser may nevertheless be valid between parties who are aware of the facts." The following authorities support the text: *Hamilton v. Miller* (1891), 46 Kan. 486, 26 Pac. 1030; *Leighton v. Stuart* (1886), 19 Neb. 546, 26 N. W. 198; *Cole v. Green* (1889), 77 Iowa 307, 42 N. W. 304, 14 Am. St. 283; *Clapp v. Trowbridge* (1888), 74 Iowa 550, 38 N. W. 411.

A summary of the law relative to the description of property in a chattel mortgage is stated in 1 Cobbey, Chattel Mortgages, §188, as follows: "The general rule seems to be that, as between the parties, any description is good, if the parties at the time knew and understood what the mortgage covered. That as to third parties, where the property intended to be mortgaged was identified at the time, any description which points out the particular

property, or suggests inquiries by which it can be identified outside of the instrument, is good against the world." This, it seems to us, is a reasonable and correct statement of the law. Under the complaint and facts specially found, it affirmatively appears that appellant's rights are not injuriously affected, and hence he has no right to raise the objection that the mortgage does not definitely describe the property. No pretense is made that the decree does not cover the specific horses intended by the parties to be embraced in the mortgage.

In *Gurley v. Davis* (1882), 39 Ark. 394, it was held that as between the mortgagor and the mortgagee of personal chattels a specific and particular description of the several articles mortgaged, by which to identify them from other like articles of the mortgagor, is not necessary. To the same effect are *Call v. Gray* (1859), 37 N. H. 428, 75 Am. Dec. 141; *Leighton v. Stuart*, *supra*. See, also, *Elder v. Miller*, (1872), 60 Me. 118.

In *Gammon v. Bull* (1892), 86 Iowa 754, 53 N. W. 340, it was held that a chattel mortgage was good as between the parties and as against persons having notice, though the description of the property was so defective as not to give constructive notice. It is no doubt the general rule that an attempt to mortgage a particular number of articles in a larger number of like kind is void unless the articles to be mortgaged are separated or so designated that they may be distinguished. 5 Am. and Eng. Ency. Law (2d ed.), 962, and authorities cited.

But this rule does not apply where the rights of strangers are not involved, for in the absence of innocent purchasers or creditors a specific description is not necessary. 5 Am. and Eng. Ency. Law (2d ed.), 963, and authorities cited.

In *Plano Mfg. Co. v. Griffith* (1888), 75 Iowa 102, 39 N. W. 214, it was held that a description in a chattel mortgage so indefinite that the recordation thereof would not be constructive notice is, nevertheless, good as to all parties

having actual notice of its existence and the intent as to the property which it was designed to include. This rule should apply with greater force to the parties to a mortgage.

In case of *Knapp, Stout & Co. v. Deitz* (1885), 64 Wis. 31, 24 N. W. 471, it was held that a description in a chattel mortgage as "forty-one Berkshire hogs and sixty-five grain-sacks" was not so uncertain as to invalidate the mortgage. A description of the property mortgaged as "six head of heifer calves one year old," "one steer calf one year old," and "forty shoats, all now on my farm," etc., was held sufficient where it appears that the mortgagor owned the stock described, and that they were on the farm, etc. *McGarry v. McDonnell* (1891), 82 Iowa 732, 47 N. W. 866.

A similar description of stock mortgaged was held sufficient even against subsequent purchasers from the mortgagor. *Kenyon v. Tramel* (1886), 71 Iowa 693, 28 N. W. 37.

A mortgage describing ten horses in the possession of the mortgagor was held not void for uncertainty or insufficiency of description, upon the theory that under such description it was competent to prove that the horses taken by the mortgagees were those actually mortgaged. *Eddy v. Caldwell* (1862), 7 Minn. 225.

As against a subsequent purchaser, a description as "one dark wood chamber suite (three pieces), one center table," etc., now in their (mortgagors') possession in the city of Minneapolis, etc., was held sufficient. *Adamson v. Horton* (1889), 42 Minn. 161, 43 N. W. 849. See, also, *Tolbert v. Horton* (1885), 33 Minn. 104, 22 N. W. 126.

The cases relied upon by appellant are principally those where the rights of innocent third persons have intervened, and hence are not of controlling influence here.

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It seems to be the rule, well fortified by the authorities, that parol evidence is admissible to identify property conveyed in a chattel mortgage and to separate it from

8. other property of a similar kind. 9 Am. Digest (Century ed.), p. 2373, and authorities cited.

Under the complaint and findings in this case, it clearly appears that the horses against which the decree is to operate, are the identical ones that were intended by both of the parties to be included in the mortgage, and it matters not whether appellant at the time had other horses of like or different kind. From the whole record we are led to the conclusion that the respective rights of the parties have been rightly adjudicated, and no error is presented prejudicial to appellant.

Petition for a rehearing overruled.

DAVY ET AL. v. BROWN, RECEIVER.

[No. 5,776. Filed June 26, 1906.]

APPEAL AND ERROR.—Joint Assignment.—Several Exceptions.—

Where appellants jointly assign as error the overruling of appellants' motion for a new trial, a part only joining in such motion, and those joining taking a several exception thereto, no question is presented on appeal.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Final report of John M. Brown, as receiver of the Havercamp-Whitney Paper Company, to which James Davy and others except. From a judgment confirming such report, the exceptors appeal. *Affirmed.*

Deneen & Hamill, E. N. Zoline and Talcott & Fish, for appellants.

John A. Hibberd, Stuart MacKibbin, John L. Sinkes and Brick & Bates, for appellee.

BLACK, J.—The "errors relied upon for a reversal" in the brief of the appellants all pertain to what is designated in the brief as the twenty-sixth assignment of error, which

is that "the court erred in overruling the motion of the appellants for a new trial."

This assignment is made by a large number of persons and corporations jointly, as appellants. The motion for a new trial was made by a portion only of the appellants, and it appears from the record that those who made the motion excepted "separately" to the action of the court thereon. Not only did those appellants affected by the ruling not except to it jointly, but also some of the appellants jointly assigning the ruling as error did not take any exception thereto.

Judgment affirmed.

STEPHENS v. AMERICAN CAR & FOUNDRY COMPANY.

[No. 5,791. Filed June 26, 1906.]

1. **APPEAL AND ERROR.**—*Briefs.*—*Amendments.*—Where appellant fails to show in his brief that he excepted to the alleged erroneous ruling of the trial court, but by permission of the court he amends such brief to show such exception, the alleged error is properly presented. p. 416.
2. **MASTER AND SERVANT.**—*Negligence.*—*Contributory.*—*Factory Act.*—*Dangerous Machinery.*—*Failure to Guard.*—Where the servant attempted to adjust an unguarded dangerous machine, operated by him in defendant's factory, without stopping the same, the question of contributory negligence is properly submitted to the jury. p. 418.
3. **TRIAL.**—*Negligence.*—*When Question for Jury.*—Where there reasonably may be a difference of opinion whether defendant is guilty of negligence, the question is for the jury. p. 419.
4. **SAME.**—*Directing Verdict for Party Having Burden of Proof.*—The court should not direct a verdict for the party having the burden of proof where the verdict must be based on the testimony of witnesses, wholly or partially. p. 419.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by Ulysses G. Stephens against the American Car & Foundry Company. From a judgment for defendant, plaintiff appeals. *Reversed.*

Stephens v. American Car, etc., Co.—38 Ind. App. 414.

Stotsenburg & Weathers, for appellant.

M. Z. Stannard, for appellee.

COMSTOCK, P. J.—Action against appellee for personal injuries sustained by the appellant while working at an unguarded machine in appellee's factory.

The complaint was in three paragraphs and based upon the negligent act of the appellee in failing to guard a machine in its factory, as required by the statute. The second and third paragraphs of the complaint were withdrawn, the cause was put at issue by general denial, and submitted to a jury, which, by direction of the court, returned a verdict for the appellee.

The only error assigned and relied upon by the appellant is the action of the court in overruling his motion for a new trial. This assignment challenges the action of the trial court in peremptorily instructing the jury to find for the appellee.

The paragraph of the complaint upon which the cause was tried, omitting the formal parts, alleges in substance that defendant corporation owned and operated in its establishment, at and for a long time prior to the grievances mentioned in the complaint, a machine which was used for the purpose of cutting moulding and dressing and cutting wood into various shapes; that the same was fastened to a frame on a table, extending above the same so as to come in contact with the wood held by the person operating the same; neither said machine nor the bit thereof was then and there guarded, although both could have been properly guarded without interfering with the proper operation of the same, which would have prevented any injury or danger of injury; but that defendant, well knowing that the same had not been done, then and there for more than a month immediately prior thereto, in violation of the laws of the State of Indiana, negligently failed to guard said machine; that on May 6, 1903, plaintiff was in the service of the defendant as an employe at its plant, and, being by

his contract of employment with defendant required so to do, was then and there engaged in operating said machine in cutting moulding, and in order to have the machine cut through it was necessary to reset the machine, which the plaintiff was required to do, and while engaged in loosening the set-screw with a wrench his hand slipped, and, on account of said machine's not being properly provided with a guard, came in contact with the bit of the machine, mangleing his fingers and hand to such an extent that it was necessary to cut off parts of his fingers. It further avers that said injury was caused by the negligent act of the defendant in failing to guard said machine, and without any negligence on his part; that plaintiff had operated the machine for only two days prior to said accident.

Counsel for appellee points out that appellant's brief does not disclose that appellant excepted to the ruling of the court directing the verdict for appellee; that

1. under rule twenty-two of this court it is essential that this should appear in the brief. Appellant, by permission of the court, has since filed an addition to the statement of the record contained in his original brief, in compliance with said rule. With this rule complied with, the only remaining question discussed is whether appellant was guilty of contributory negligence.

The evidence showed that the machine was used in cutting moulding; that there was a lower head to the machine which was fastened to a stem which ran down a false leg of the machine, and that the same was held in place by a set-screw, so called, or a jamb nut. By loosening this nut the operator could turn the screw which was at the bottom of this false leg, and thereby elevate or lower the head, making it cut deeper or shallower, as desired; that a hood or guard had been provided for the machine, which properly protected the same and aided in carrying away the shavings or dust; that about two months before the machine had been removed from near the wall and the guard

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left off, leaving the machine unguarded; that it was necessary to adjust the machine by running up this lower head; that appellant was required to do so; that it was not necessary to stop the machine to effect this; that the screw was six or eight inches below the head; that appellant, without stopping the machine, used a wrench on this occasion, which threw his hand some five or six inches further away; that when he placed the wrench on the screw his fingers were directly under and within six inches of the knives, the space between the knives and his fingers being open; that the wrench was furnished by appellee; that for some reason it slipped and appellant's hand was thrown into the knives and injured; that if the machine had been guarded appellant's hand would have struck the guard and would not have been injured. It further appears that the knives were making 3,800 revolutions per minute; that the machine was operated by steam-power; that it was provided with a belt, a tight and a loose pulley and a belt-shifter; that when the belt was adjusted to the tight pulley the machine was set in operation, and when adjusted to the loose pulley it was stopped; that the belt could be shifted from the tight to the loose pulley by the operator by the use of the belt-shifter; that appellant had started and stopped this machine on other occasions by use of the belt-shifter; that he had had several years' experience as a wood worker, and had operated several machines in several factories, and had operated a sticker similar to the one on which he was hurt before he worked for appellee, and knew that the machine was dangerous. There was no evidence that the bits or head could be adjusted while the machine was not running. Appellant testified that at the time of the accident he had to run the head up to dress the bottom part of the moulding, "it was leaving it rough."

If the appellant was guilty of contributory negligence, it was because he tried to adjust the machine when it was

in motion. It is claimed by the appellee that it

2. appears from the evidence that there were two methods open to appellant of adjusting the set-screws—one by stopping the machine and making the adjustment while it was not in operation, the other by making the adjustment while the machine was running; that the latter was the more dangerous, and that where two methods of performing a service are open to a servant, and he chooses the more dangerous one, he is guilty of contributory negligence. Citing *Labatt, Master and Serv.*, §339; *Levey v. Bigelow* (1893), 6 Ind. App. 677; *Gorman v. Des Moines Brick Mfg. Co.* (1896), 99 Iowa 257, 68 N. W. 674; *Deering v. Canfield & Wheeler Co.* (1901), 121 Mich. 373, 85 N. W. 874; *Foss v. Bigelow* (1899), 102 Wis. 413, 78 N. W. 570; *Moody v. Smith* (1896), 64 Minn. 524, 67 N. W. 633; *Hartwig v. Bay State Shoe, etc., Co.* (1889), 118 N. Y. 664, 23 N. E. 24; *Buehner Chair Co. v. Feulner* (1902), 28 Ind. App. 479; *Bailey, Master's Liability*, 169; *Jonesboro, etc., Turnpike Co. v. Baldwin* (1877), 57 Ind. 86.

These authorities may be said fairly to support appellee's claim, but it should appear that this choice was made with the knowledge that the bits could be adjusted while the machine was not running. It was necessary that the head be run up and down frequently as they varied the size of the moulding. It was moved by turning the screw which was provided for the purpose. It was not shown that the machine was ever stopped to run this head up or down. All that was required of appellant was that he should use reasonable care. If he was guilty of contributory negligence it was only because he attempted to make the adjustment when the machine was running. Appellant testified that it was not necessary to stop the machine to change the screw. So far as any inference may be drawn from the evidence, it was the custom to make such adjustment while the machine was running. By analogy the

Stephens v. American Car, etc., Co.—38 Ind. App. 414.

following cases strongly support the proposition that the evidence made a case to be submitted, under proper instructions, to the jury. *Wortman v. Minich* (1901), 28 Ind. App. 31; *Davis Coal Co. v. Polland* (1902), 158 Ind. 607, 92 Am. St. 319; *Espenlaub v. Ellis* (1904), 34 Ind. App. 163; *Baltimore, etc., R. Co. v. Cavanaugh* (1905), 35 Ind. App. 32; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413; 1 *Shearman & Redfield, Negligence* (5th ed.), §55. *Beach, Contrib. Neg.* (3d ed.), §447.

We need only refer to the rule that where there may be a difference of opinion as to whether an act is negligent or not, or how work should be performed in order to

3. be safe, the question should be left to the jury. It has been held by this court that a request on behalf of the party having the burden of the issue on a trial, for direction to the jury to return a verdict in his

4. favor, should not be granted when the verdict must be based upon the testimony of witnesses, wholly or partially. *Jacobs v. Jolley* (1902), 29 Ind. App. 25; *Wagner v. Weyhe* (1905), 164 Ind. 177; *Board, etc., v. Garrigus* (1905), 164 Ind. 589; *Messick v. Midland R. Co.* (1891), 128 Ind. 81; *Gaff v. Greer* (1882), 88 Ind. 122, 45 Am. Rep. 449; *Houghton v. Aetna Life Ins. Co.* (1905), 165 Ind. 132.

The negligence of the defendant in failing to provide a guard is not questioned, nor that the machine could and should have been guarded as required by law, nor is it claimed that the plaintiff was guilty of any negligence, unless the attempted adjustment constituted negligence. The burden of the issue upon the question of contributory negligence, raised by the general denial, is upon the defendant, and is to be determined from all the evidence in the cause. The court erred in directing the verdict.

Judgment reversed, with instructions to sustain appellant's motion for a new trial. Robinson, C. J., Wiley, Myers and Roby, J. J., concur. Black, J., dissents.

PEOPLE'S STATE BANK v. RUXER.

[No. 5,696. Filed June, 26, 1906.]

1. **PLEADING.**—*Argumentative Denial.*—It is not error to hold an argumentative denial good, although its facts are provable under another paragraph of answer. p. 421.
2. **TRIAL.**—*Interrogatories to Jury.*—*Irresponsive.*—*Refusal to Submit.*—It is not error to refuse to submit interrogatories to the jury where the facts sought are irresponsive to the issues. p. 421.
3. **APPEAL AND ERROR.**—*Interrogatories to Jury.*—*Request for Record.*—To raise any question on the court's refusal to submit interrogatories to the jury, the record must affirmatively show that they were submitted to the court before the argument of counsel began. p. 421.
4. **SAME.**—*Instructions.*—*Failure to Make Evidence Part of Record.*—Where appellant fails to make the evidence a part of the record, instructions will be presumed to be applicable to the evidence given. p. 422.
5. **SAME.**—*Instructions.*—*Not All in Record.*—*Presumptions.*—Where all instructions are not affirmatively shown to be in the record, the presumption is that erroneous ones were withdrawn or corrected by those omitted from the record. p. 422.

From Perry Circuit Court; C. W. Cook, Judge.

Action by the People's State Bank against Frank X. Ruxer. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Fisher & Gray, Suddarth & Casper and Charles F. Coffin, for appellant.

Philip Zoercher, W. A. Land, W. C. Mason, William E. Cox and Sol. H. Esarey, for appellee.

COMSTOCK, P. J.—This cause was tried upon a substituted complaint in one paragraph. It alleges in substance that the defendant, on June 6, 1900, executed a certain promissory note for \$141, due September 1, after date, in favor of Thomas McCartney, negotiable at the Huntingburg Bank, Huntingburg, Indiana; that before its matur-

ity McCartney, for a cash consideration, assigned and indorsed said note to the plaintiff in the regular course of banking business, and that plaintiff received it without any notice of any defense held by the defendant. A copy of the note is made a part of the complaint by exhibit.

The defendant answered in four paragraphs. The second and third were withdrawn. The first was a *non est factum*. The fourth was an argumentative denial. The cause was put at issue, and a trial by jury resulted in a verdict and judgment in favor of appellee.

The errors assigned challenge the sufficiency of the fourth paragraph of answer, the sufficiency of the evidence to sustain the verdict or the judgment, the action of the court in refusing to require the jury to answer certain interrogatories, the rulings upon instructions, overruling appellant's motion for judgment on the interrogatories notwithstanding the general verdict, and overruling appellant's motion for a new trial.

The fourth paragraph of answer contains allegations which might have been stricken out upon proper motion.

Its averments were provable under the first para-

1. graph of the answer. The demurrer might, therefore, have been sustained without reversible error.

It contains also a direct denial of the execution of the note, and it was not error to hold it sufficient.

The interrogatories refused, of which complaint is made, do not call for findings of essential facts within the issues, and it was not error to reject them. *Illinois Cent.*

2. *B. Co. v. Cheek* (1899), 152 Ind. 663; *Lukin v. Halderson* (1900), 24 Ind. App. 645; *Salem Bedford Stone Co. v. Hilt* (1901), 26 Ind. App. 543; §555 Burns 1901, Acts 1897, p. 128, §1; *Town of Kentland v. Hagan* (1897), 17 Ind. App. 1.

The record does not affirmatively show that the

3. interrogatories were submitted to the court before the argument of counsel began. *Malady v. Mc-*

Enary (1868), 30 Ind. 273. This specification is not sustained.

The evidence is not made, nor attempted to be made, a part of the record. Under these conditions, presumptions are indulged in favor of the action of the trial

4. court in giving and in refusing to give instructions.

Sheeks v. Fillion (1892), 3 Ind. App. 262; *DeHart v. Board, etc.* (1896), 143 Ind. 363; *Fifth Ave. Sav. Bank v. Cooper* (1898), 19 Ind. App. 13; *South Bend, etc., Plow Co. v. Geidie* (1900), 24 Ind. App. 673.

It does not affirmatively appear that the instructions given are all set out in the record. When erroneous instructions are given, and all the instructions are

5. not in the record, it will be presumed that they were withdrawn or corrected by others given and not set out in the record. *State v. Winstandley* (1898), 151 Ind. 495.

Appellant concedes that there was no error in overruling its motion for judgment on the interrogatories notwithstanding the general verdict. This disposes of all the questions presented. This is the second appeal of this cause. *People's State Bank v. Ruxer* (1903), 31 Ind. App. 245. It has been thrice tried by jury. The record presents no reversible error.

Judgment affirmed.

CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY v. BRAVARD.

[No. 5,272. Filed February 15, 1906. Rehearing denied April 26, 1906. Transfer denied June 26, 1906.]

1. TRIAL.—*Pleading.*—*Proof.*—*Variance.*—*Carriers.*—*Railroads.*—*Negligent Operation of Train.*—Evidence of a defective truck, causing plaintiff's coach to be sidetracked and plaintiff to be injured, is not a variance from the complaint alleging a negligent operation of the train. p. 425.

Cincinnati, etc., R. Co. v. Bravard—38 Ind. App. 422.

2. TRIAL.—*General Verdict*.—*Effect*.—A general verdict in favor of plaintiff is a finding in his favor on all of the issues. p. 426.
3. CARRIERS.—*Railroads*.—*Care Toward Passengers*.—Slight negligence on the part of the carrier renders such carrier liable to a passenger injured without his own fault. p. 426.
4. SAME.—*Railroads*.—*Injuries to Passengers*.—*Burden of Proof*.—Where the passenger shows injuries caused by the carrier, such carrier, to escape liability, must show that such injuries could not have been avoided by the highest practicable care. p. 426.
5. SAME.—*Railroads*.—*Coach Leaving Track*.—*Res Ipsa Loquitur*.—*Burden of Proof*.—The doctrine of *res ipsa loquitur* applies to an injury, received by a passenger on a railroad and caused by the trucks of plaintiff's coach leaving the track, the burden being upon defendant to show clearly by the evidence that such cause was unavoidable. p. 426.

From Rush Circuit Court; *Douglas Morris*, Judge.

Action by Lucinda Bravard against the Cincinnati, Indianapolis & Western Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

R. D. Marshall and Smith, Cambern & Smith, for appellant.

Elmer Bassett and Hord & Adams, for appellee.

ROBY, C. J.—Action for damages; complaint in four paragraphs; answer in general denial; trial; verdict for \$3,100, with answers to interrogatories; motions for judgment on answers and for a new trial overruled; judgment on verdict.

The first question for decision is whether appellant's motion for judgment notwithstanding the general verdict was well taken. The averments of the complaint are that defendant was on May 13, 1903, a common carrier of passengers for hire; that appellee took passage in a passenger-coach, attached to one of its passenger-trains, to be transported from Indianapolis to Morristown, and paid the usual fare therefor; that said train was run at a high rate of speed past a switch leading from the main line to a parallel siding, and that the coach in which plaintiff was

riding left the main track and ran upon said switch, thereby jerking and stopping said train violently, and injuring plaintiff.

In the first paragraph of complaint it is averred that the defendant negligently and carelessly ran and operated its said train of cars so that one of the trucks of the passenger coach left the main track, etc.

The negligence averred in the second paragraph of complaint is that the defendant permitted the connections, appliances and rails connecting said switch and main track to get out of repair, to become dangerous to passenger trains running over the same, which defects the plaintiff cannot describe, thereby causing the injury, etc.

The negligence specified in the third paragraph is that the defendant failed to operate said switch, etc.; and in the fourth paragraph, that the defendant negligently ran and operated its train so that some of the trucks of some of the cars, and one of the trucks on the car in which plaintiff was riding, left the track, etc.

The general verdict finds for the plaintiff on every material allegation. It is contended that the answers to interrogatories negative each charge of negligence made. Interrogatories one, two, six, eight and nineteen are as follows: "No. 1. Was any injury the plaintiff received on a train of the defendant company on May 13, 1903, attributable to any defect in the cars owned by the defendant? A. Yes. No. 2. If you answer 'Yes' to interrogatory No. 1, state in what the defects in the cars consisted. A. It is the belief of the jury that the rear trucks of the ladies' coach were defective." "No. 6. Were not the cars and equipment of the defendant's train properly inspected just a few minutes before the accident occurred, and found to be in good condition? A. No." "No. 8. If you answer interrogatory No. 7 'No,' then state wherein any defect in the same is shown by the evidence. A. They were defective, but no conclusive evidence that shows the defect." "No. 19.

State from the evidence what was the cause of the car in which plaintiff was riding leaving the track. A. Defective trucks." It is further stated in the answers that the injury was not caused by any defect in the switch or rails, all of which were in good condition; that the train was stopped in a reasonable time after the derailment; that the employes in charge of it were competent, and no act of negligence on their part was shown; that the train was running from six to eight miles an hour, and that a switchman was at his post at the time of the accident.

The contention is that the verdict is thus expressly placed upon a ground which is not made a basis of any charge of negligence, and that the plaintiff can only recover

1. according to her allegations. The truck of the car is, in each paragraph, averred to have left the track. In the first and fourth paragraphs it is alleged that the train was negligently run and operated. Appellant's position is that proof of a defective truck will not support a charge of negligently running and operating a railroad train, and that a defect in the truck was no part of the operation of the train. The findings are that the truck was defective, and that proper inspection was not made.

Appellant cites many authorities relative to the operation of a railroad and acts necessary thereto, but they are not controlling, for the reason that the negligence averred consists in running and operating the train, being thereby specifically limited to that particular act. Negligence might, no doubt, consist in permitting a car-truck to be or remain defective, but it does not follow that the existence of such defect cannot enter into and be considered in the question of due care in the operation of the train.

If the appellant knew, or in the exercise of reasonable care, should have known of the defective condition of such truck, its subsequent conduct in running its train must be considered in the light of such defect and knowledge. The

truck might have been in such a condition as to make it highly negligent to run the train at all, or at even so moderate a rate as six or eight miles an hour. In determining whether a train is negligently or carefully operated, the character of the train and the condition of the cars and appliances thereto belonging must necessarily be taken into account. *Louisville, etc., R. Co. v. Jones* (1886), 108 Ind.

551, 557. The effect of the general verdict is to

2. determine all issues in appellee's favor. The answers to interrogatories are not necessarily inconsistent with such finding, showing, as they do, that the duty of inspection was not discharged. Slight negligence is sufficient to render the carrier liable to a passen-

3. ger injured without his own fault. *Cincinnati, etc., R. Co. v. Worthington* (1903), 30 Ind. App. 663, 96 Am. St. 355; *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74. The defective truck cannot be dissociated from the operation of the train, and the verdict does not, therefore, stand upon facts outside the issues.

Motion for a new trial should have been sustained, if the appellant introduced evidence sufficient to rebut the presumption of negligence, and to show that the acci-

4. dent was inevitable and unavoidable, against which such human skill, prudence or foresight as should apply to careful management could not provide. *Louisville, etc., R. Co. v. Jones, supra*.

The accident complained of belongs to that class in which negligence is presumed from the fact of its occurrence. *Terre Haute, etc., R. Co. v. Sheeks, supra*;

5. *Indianapolis St. R. Co. v. Schmidt* (1904), 163 Ind. 360. The presumption sustained the verdict.

It is not shown what caused the derailment of the car. No evidence has been referred to in the argument from which it can be said that the trucks were defective. Appellant introduced witnesses whose testimony tended to controvert the existence of the specific acts of negligence charged.

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The reason for the derailment is not shown by appellant, while appellee avers, by one paragraph of her complaint, that its cause is unknown to her. In the absence of the presumption there could be no recovery. It is not sufficient to overcome such presumption to show that the cause is obscure. In the absence of specific proof otherwise, the circumstances were sufficient to justify the jury in finding negligence. *Toledo, etc., R. Co. v. Fenstermaker* (1904), 163 Ind. 534, 538. Judgment affirmed.

OVER *v.* DEHNE.

[No. 5,382. Filed October 10, 1905. Rehearing denied February 16, 1906. Transfer denied June 26, 1906.]

1. **APPEAL AND ERROR.**—*Briefs.*—*Waiver.*—*Court's Duty to Find Errors.*—It is not the duty of the Appellate Court to hunt up errors not pointed out in the briefs; and such errors not pointed out are waived. p. 430.
2. **PLEADING.**—*Complaint.*—*Initial Attack on Appeal.*—A complaint attacked for the first time on appeal will be held sufficient if it states facts sufficient to bar another action for the same cause. p. 431.
3. **APPEAL AND ERROR.**—*Independent Assignments.*—*New Trial.*—*Causes for.*—Causes for a new trial cannot be assigned as error independently on appeal. p. 431.
4. **NEW TRIAL.**—*Reasons.*—*Statutes.*—Reasons for a new trial not prescribed by the code (§568 Burns 1901, §559 R. S. 1881) will not be considered. p. 431.
5. **NUISANCE.**—*Foundry.*—*Prescription.*—The operation of a foundry for more than twenty years at the same location does not give its owner a prescriptive right to continue its operation, where, prior to two years preceding the suit, it had not been dangerous to plaintiff's property, but since such time it had set his house on fire several times, destroyed the usefulness of his cistern and caused his house to be uncomfortable and in imminent danger all of the time. pp. 431, 438.
6. **NEW TRIAL.**—*Nuisance.*—*Setting Fires.*—*Evidence.*—Evidence that sparks frequently fell from defendant's foundry on plaintiff's house, that several fires broke out on plaintiff's roof, always when the foundry was running, and

that defendant frequently sprinkled plaintiff's roof before starting the foundry fire, sufficiently sustains a finding that the fires to plaintiff's house, complained of, started from such foundry. p. 434.

7. **APPEAL AND ERROR.—Weighing Evidence.**—The Appellate Court will not weigh conflicting oral evidence in an equity case. pp. 435, 437.
8. **TRIAL.—General Finding.—Itemizing Damages.—Surplusage.—Appeal and Error.**—Where a special finding is not called for and a general finding is made, the court's items of damages sustained by plaintiff will be considered as surplusage; and the court will not consider whether such items are sustained by the evidence. p. 435.
9. **EVIDENCE.—Nuisance.—Fires.—Willingness of Plaintiff to have House Inspected.**—In a suit to enjoin defendant from operating a foundry which was throwing sparks on plaintiff's house, it was not competent to ask plaintiff whether he would be willing to have an expert examine his flues to see if fires could not originate there. p. 436.
10. **SAME.—Record of Fire Company.—Hearsay.**—The records of a fire company, kept under the regulations of the city fire department, and made by the captain of the company from a memorandum made by another person, the captain not being at the fire, are not competent to prove the origin of the fire so recorded, being inadmissible hearsay. p. 436.
11. **SAME.—Nuisance.—Setting Fires.—Subsequent Fires.**—Evidence of subsequent fires caused by sparks from defendant's foundry admitted as a circumstance tending to show that a similar, prior fire was caused thereby, even if erroneous, was harmless and not reversible error. p. 437.

From Superior Court of Marion County (64,223);
Vinson Carter, Judge.

Suit by Charles Dehne against Ewald Over. From a decree for plaintiff, defendant appeals. *Affirmed.*

Austin F. Denny, for appellant.

Kealing & Hugg, for appellee.

WILEY, C. J.—Appellee sued appellant to recover damages resulting from fire alleged to have been communicated to his dwelling from appellant's foundry, and to enjoin appellant from continuing to operate his foundry and

cupola so as to interfere with the comfortable enjoyment of his premises.

The complaint was in a single paragraph, to which an answer in six paragraphs was addressed. Reply in denial. Upon the issues thus joined, trial was had by the court, resulting in a general finding and judgment for appellee.

Appellant's motion for a new trial was overruled. By his assignment of errors he questions the sufficiency of the complaint, and attacks the action of the court in overruling his motion for a new trial.

In his complaint appellee alleges that for many years he has owned, and still owns, certain real estate, upon which is a dwelling-house, which he occupies as a residence; that appellant also owns certain real estate, upon which he has erected a foundry, which he owns and operates; that as a part of said foundry appellant constructed a brick cupola, about thirty feet north of appellee's house; that appellant uses said cupola almost every day from one and one-half to two hours, in which to melt iron; that he uses wood, coal and coke in the operation of the same; that chunks of burning wood fly from the cupola in all directions, and, except when the wind is from the south, the sparks and pieces of burning wood are carried upon appellee's premises, and frequently upon his dwelling; that his dwelling has caught fire therefrom four times within the past two years, and whenever said cupola is in operation his dwelling is in constant and imminent danger of being destroyed by fire; that pieces of burning wood and cinders from the cupola have fallen on the roof of his house in large quantities, have filled the down spouting more than twice in the past six months, and he has been compelled to clean out said spouting frequently; that he obtains rain water for use in his house by its being carried from the roof through the down spouting into a cistern, and by reason of said facts he is unable so to obtain rain water, and

is put to great inconvenience and damage on account thereof.

It is further alleged that when said cupola is in operation, and the doors and windows of his residence are open, the sparks and cinders therefrom are carried into his house and the house is filled with smoke coming from the cupola, which is offensive and injurious to the health of himself and family; that appellant could arrange and operate his cupola so that the sparks, smoke, ashes and chunks of burning wood would not be carried upon and into his dwelling, and constantly expose him and his family to danger, annoyance and injury, and his property to constant danger of destruction by fire; that by reason of these facts appellee's comfortable enjoyment of his home has been and is constantly interfered with, and the value of his real estate for a residence and for rental purposes has greatly depreciated; that his residence, when said cupola is in operation, is in constant and imminent danger of being damaged and destroyed by fire, and that he has been damaged by the fires caused by reason of the same, as aforesaid, etc.; that appellant is threatening to, and will, continue to operate the same in the same manner; that appellee has been damaged by reason of the facts aforesaid in the sum of \$500, and the continuance of the same will do him irreparable damage. Prayer for damages and injunction.

The complaint is attacked for the first time in this court. Counsel for appellant in his brief says: "The appellant has no supreme confidence that his first assignment of

1. error, referred to in the caption, is well taken. But sometimes a court of appeals sees points and decides cases upon points not seen nor mentioned by the parties." No tenable objections to the complaint are pointed out.

The rule is a familiar one, that where a complaint is tested for the first time on appeal by an assignment of

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error, it will be held sufficient if it states facts suf-

2. ficient to bar another action. *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Bertha v. Sparks* (1898), 19 Ind. App. 431; *Cummings v. Girton* (1898), 19 Ind. App. 248. The complaint in this case comes within this rule, and hence must be held sufficient.

It has been stated in this opinion that but two questions are presented by the assignment of error. It is due counsel for appellant, however, to say that an applica-

3. tion was made and granted for leave to file an amended or additional assignment of errors, and in pursuance thereto sixteen additional specifications of error were filed. While some of these, and possibly all, might be proper reasons for a new trial, under our practice, they are not recognized as proper assignments of error.

In his motion for a new trial appellant assigned twenty-eight reasons therefor. Reasons 2, 3, 4, 5, 6, 8, 9, 14, 15, 16, 17, 18 and 19 so assigned are not known

4. to the code (§568 Burns 1901, §559 R. S. 1881), and do not present any question for decision.

The first and seventh reasons may be considered together, as they present the statutory reasons for a new trial, that the decision of the court is not sustained by suffi-

5. cient evidence and is contrary to law, and both depend for their determination upon the evidence.

The tenth, eleventh, twelfth and thirteenth reasons present the question of excessive damages, and may be considered together. The remaining reasons predicate error of the trial court in admitting and rejecting, and refusing to strike out, certain evidence. These will be considered in the order of their discussion in the briefs.

The evidence shows without conflict that appellant had owned and operated his foundry for twenty years, and that appellee had owned and occupied his property adjacent thereto for more than twenty years. While so owning and operating said foundry, the evidence also shows that for

more than twenty years prior to February, 1901, no fire had occurred to the damage of appellee's property. The fires that damaged appellee's property occurred since 1901, and within two years from the commencement of this suit. There is no positive or direct evidence that the fires were occasioned by sparks or burning chunks of wood falling upon appellee's house from the cupola, for no witness testified to that fact. Upon the evidence it is contended by appellant that the decision is not supported by sufficient evidence and is contrary to law, for two reasons: (a) Because the evidence shows that appellant had acquired a prescriptive right so to operate his foundry, and (b) because the evidence fails to show that the damage to appellee's property was caused by fire communicated to it from the cupola.

The complaint proceeds and the trial was had upon the theory that the cupola and the manner of operating it constituted a private nuisance; for it is alleged in the complaint that the defendant can arrange and operate his said cupola so that said sparks, smoke, ashes and chunks of burning wood will not be carried upon, into and through plaintiff's house, constantly exposing him and his family to danger and injury, and his property to constant danger of destruction. The theory, as above stated, is manifest as shown by the evidence and the rulings of the trial court. For more than twenty years prior to 1901 no complaint was made of the manner in which the cupola was operated. The evidence clearly establishes the fact that since that time the manner in which the cupola was operated constituted a private nuisance, and greatly interfered with appellee's occupancy and enjoyment of his property. The injury thus caused was a continuing one, and the nuisance was also a continuing one.

Appellee sought to recover damages caused by three several fires, all of which occurred since 1901, and for a

decrease in the rental value of his property. We doubt if a prescriptive right can be acquired to burn and destroy the property of another. When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful, or that is necessary to the operation of the business. 21 Am. and Eng. Ency. Law (2d ed.), 689; *Chicago, etc., R. Co. v. First Methodist Episcopal Church* (1900), 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; *Shively v. Cedar Rapids, etc., R. Co.* (1887), 74 Iowa 169, 37 N. W. 133, 7 Am. St. 471; *Thompson v. Pennsylvania R. Co.* (1889), 45 N. J. Eq. 870, 14 Atl. 897; *Columbus, etc., Iron Co. v. Tucker* (1891), 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. 528.

In *Owen v. Phillips* (1881), 73 Ind. 284, 296, it is held that wherever a mill or factory is located, whatever its surroundings, property owners of the vicinity have a right to require that it shall be properly managed, conducted with ordinary care and proper regard for the rights of others, and in such a way that no unnecessary inconvenience or annoyance shall be caused by it. The rule there disclosed is applicable to the facts here, for that is what appellee asks, and what the trial court held he had a right to demand.

It is not alleged that appellant's business is an unlawful one, but that in the operation of a part of it—the cupola—great injury is done to appellee's property, and appellee and his family are put in jeopardy, and to inconvenience and annoyance. It is further contended that these could all be averted by a proper operation of the cupola.

In *Peck v. City of Michigan City* (1898), 149 Ind. 670, the Supreme Court quoted with approval the following from 16 Am. and Eng. Ency. Law, 988: "Where the injury inflicted by a nuisance is not of such a character that it can be ascertained, both as to the past and future by a single action, successive actions lie for new damages so long

as the nuisance is continued,” and then say: “Many authorities are cited in support of this proposition, and little doubt can exist concerning its accuracy.”

In the case of the *City of North Vernon v. Voegler* (1885), 103 Ind. 314, it was held that a cause of action for damages does not accrue until the wrong or injury has resulted in damage. See, also, *Sherlock v. Louisville, etc., R. Co.* (1888), 115 Ind. 22; 21 Am. and Eng. Ency. Law (2d ed.), 724.

In 2 Wood, Nuisance (3d ed.), §708, it is said that in order to sustain a plea of a prescriptive right to the nuisance when the same consists of the right to do some act upon another's premises, the rule is: “That to constitute an adverse user requisite to sustain the right, it must be shown that the user has actually invaded the rights of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period, and the invasion of the right, has produced an injury equal to, and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor.” See, also, *Sherlock v. Louisville, etc., R. Co., supra*; 21 Am. and Eng. Ency. Law (2d ed.), 735.

Our conclusion is that the evidence is sufficient to sustain the finding of the trial court as against appellant's contention that he has acquired a prescriptive right to operate his cupola in the manner complained of.

The proposition that the evidence is not sufficient to sustain the finding, upon the ground that there was not any direct or positive evidence that appellee's property

6. caught fire from sparks, etc., emitted from appellant's cupola, is not well grounded. It is disclosed by the record that when the wind was from the north or northwest appellant's employes, either of their own volition or at the request of appellee's daughter, sprinkled the roof

of appellee's house before each blast was run. It is thus shown that danger was imminent and anticipated by appellant. It is further disclosed by the evidence that the fires which damaged appellee's property always occurred while the cupola was in operation. There is some evidence, as to one of the fires, that it could not have occurred from any other source. The evidence also shows that sparks were seen to fall on appellee's house while the cupola was in operation. Under such facts, we are inclined to the view that, as the trial court could indulge all reasonable inferences, its finding was fully justified, and hence we cannot disturb it.

It is also contended that the evidence is not sufficient to sustain the finding as to the amount of damages assessed. With this contention we cannot agree, for upon that point the evidence is ample.

As this is an equity case, we are urged to weigh and consider the evidence under section eight of the act of 1903 (Acts 1903, p. 338, §641h Burns 1905). Under

7. the recent holdings of this and the Supreme Court, we must decline to weigh conflicting oral evidence. *Parkison v. Thompson* (1905), 164 Ind. 609; *United States, etc., Paper Co. v. Moore* (1905), 35 Ind. App. 684.

As above indicated, the court made a general finding, in favor of appellee, fixing his damages at \$247. The court after announcing its finding for said amount, itemized the damages as follows: \$50 for the first fire; \$125 for the second fire; and \$72 for the depreciation of the rental value of appellee's property. The court was not required to itemize the amount of damages, and in no sense can this itemized statement, as it appears in the record, be considered as a special finding, and it will therefore be treated as a general finding. The several items of damages, as designated by the court, will be considered as mere surplusage. The statement of facts in a general

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finding does not transform it into a special finding. *Lawson v. Hilgenberg* (1881), 77 Ind. 221.

It is contended by the appellant that the evidence is insufficient to support the special findings as to the amount of damages. Under the rule just stated, it is unnecessary to consider this question further, for two reasons: (1) Because the finding is general, and the amount fixed in the general finding is of controlling influence; (2) because, as stated, the evidence is sufficient to support the finding.

In the course of the examination of appellee, he was asked two questions, to which objections were made and sustained. The first was as to whether he would be

9. willing for the appellant, in connection with an expert building mechanic, to go into his house, and examine and ascertain the condition of the flues, to determine whether there was undue liability to fire from the method of construction of the house. Second, whether he was willing that an impartial person, an expert in building, should be designated by the court to make said examination, etc. There was no error in sustaining objections to these questions. It was not a question whether appellee was willing that such an inspection be made. No application, so far as the record discloses, was made to the court asking that such an examination be made. As to the authority of the court to order such an examination, it is unnecessary for us to decide, for no such question is presented.

The appellant offered to introduce in evidence the record of July 10, 1902, of the No. 2 chemical company of the fire department of the city of Indianapolis, which

10. is a record that is kept under the regulations of that department. This report was made by the captain of the chemical company from memoranda put on the slate by another person. The captain himself was not at the fire. In stating the purpose for which the record was offered in evidence, counsel stated that he expected to prove by it that the cause of the fire was a defective flue, and that

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the loss was \$25. This proposed evidence was nothing more than hearsay, and was not admissible for any purpose.

It is next contended by counsel for appellant that the court erred in overruling his motion to strike out certain testimony given by the daughter of the appellee, re-

11. lating to fires that occurred subsequently to the commencement of this suit. The testimony of this witness tends strongly to establish the fact that the subsequent fires, to which she referred, were caused by sparks from appellant's cupola. The court admitted this testimony, as disclosed by the record, "as affecting the cause of the fire, so far as it bears on previous fires." It clearly appears that the appellee did not ask, and the court did not allow, for any damages occurring subsequently to those for which he sues in this action. It is our opinion that if that evidence was incompetent, it was harmless, as it did not in any way affect the rights of the appellant. This being true, its admission would not be the cause for reversal, and no error was committed in overruling the motion to strike out.

The remaining questions raised by the motion for a new trial are expressly waived.

We do not find any error and the judgment is affirmed.

ON PETITION FOR REHEARING.

ROBY, C. J.—The petition for rehearing is supported by an earnest argument, in the course of which attention is called to statements of fact contained in the opinion

7. thought to be imperfect. It is true that the evidence shows the foundry to have been operated since 1872, but the statement that it had been owned and operated "for more than twenty years" gives the appellant the full benefit of that fact. Other corrections suggested are regarded as immaterial. Those of a clerical nature will of course be made. The contention that circumstances were shown consistent with appellant's claim that the fires complained of originated otherwise than as charged by appellee

is conceded, but there was conflicting evidence upon the subject, and the conclusion reached by the trial court cannot therefore be disturbed.

The fact that appellant had operated his foundry more than twenty years may have a bearing upon his right to continue to operate the foundry in a usual and

5. proper manner, but it does not in anywise affect his liability on account of a negligent or improper manner of operation by which surrounding property is imperiled and a nuisance created.

It is alleged in the complaint "that the defendant can arrange and operate his said cupola so that said sparks, smoke, ashes and chunks of burning wood will not be carried upon, into and through his house as aforesaid." The averment is not its own proof, but there is evidence tending to show that the cupola was operated in a manner calculated to injure adjoining property. The particular precautions which ought to have been taken are not pointed out perhaps, but the inference that a more careful method of operation would have prevented the matters of which complaint is made was not unreasonable. The record was prepared prior to the consideration by the courts of that section of the act of 1903 (Acts 1903, p. 338, §8, §641h Burns 1905) requiring the appellate tribunal to weigh the evidence in certain classes of cases, and the assignments of error were properly drawn to cover and present every phase of the case. That they were ineffective for the purpose intended was no fault of the counsel. The case made tends to establish an improper use of his property by the appellant, resulting and likely to result in injury to the property of others, and the petition is therefore overruled.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY v. RAILROAD COMMISSION OF INDIANA.

[No. 1 Railroad Commission. Filed June 27, 1906.]

1. **APPEAL AND ERROR.—Jurisdiction.—Void Statute.—Want of Jurisdiction in Trial Court.**—The Appellate Court has no jurisdiction to determine an appeal taken under a void statute or taken from the judgment of a trial court without any jurisdiction to render the judgment appealed from. p. 448.
2. **SAME.—Railroad Commission.—Special Statute.**—Appeals taken from the action of the railroad commission to the Appellate Court are taken under the special statute (Acts 1905, p. 83), and not under the general statutes providing for appeals. p. 449.
3. **RAILROADS.—Rates.—Companies' Power to Fix.—Rights of State.**—Although the statute (§5153 Burns 1901, §3903 R. S. 1881) has given railroad companies the power to fix rates, nevertheless the legislature has the power to regulate and fix such rates. p. 450.
4. **SAME.—Rates.—Power to Fix.**—The legislature may prescribe railroad rates itself, delegate the power to a commission or give the power to the railroad companies, but such rates by whomsoever made, must be reasonable. p. 450.
5. **SAME.—Rates.—Recovery of Unreasonable.**—The shipper may recover from a railroad company charges in excess of a reasonable rate. p. 450.
6. **SAME.—Rates.—Railroad Commission.—Power to Determine.**—Under the act of 1905 (Acts 1905, p. 83), it is the duty of the railroad commission, when a complaint in writing is filed, alleging that a rate is unreasonable, to determine such question, and, if such rate is found unreasonable, to set it aside and establish a reasonable one. p. 450.
7. **CONSTITUTIONAL LAW.—Fourth Coördinate Department of Government.—Power of Legislature to Create.—Railroad Commission.**—The legislature has no power to create a fourth coördinate department of government; and the powers of the railroad commission (Acts 1905, p. 83) are neither wholly legislative nor executive, but partly quasi-judicial. p. 452.
8. **RAILROADS.—Rates.—Railroad Commission.—Powers.—Review by Courts.**—Rates fixed by the railroad commission under the act of 1905 (Acts 1905, p. 83) are subject to review by the courts on the ground of unreasonableness, such question being a judicial one for the courts. Black, J., dissenting. p. 453.

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9. **APPEAL AND ERROR.**—*Boards of Commissioners.*—*General Statute for Appeals.*—*Rights Under.*—Under a general statute for appeals from the boards of commissioners appeals may be taken, unless prohibited by some special statute, from any decision involving judicial action, but not from a decision involving administrative, ministerial or discretionary powers. p. 455.
10. **SAME.**—*Boards of Commissioners.*—*Administrative Powers.*—*Appeals from.*—*Special Statute.*—Appeals may be taken from decisions of boards of commissioners on administrative, ministerial or discretionary matters where authorized by a special statute. p. 455.
11. **COURTS.**—*Appellate.*—*Jurisdiction.*—*Original.*—Prior to 1905 (Acts 1905, p. 83) the Appellate Court was never invested with original jurisdiction. p. 456.
12. **CONSTITUTIONAL LAW.**—*Appellate Court.*—*Original Jurisdiction.*—The Appellate Court, established by the legislature, may be invested with original jurisdiction. p. 457.
13. **SAME.**—*Appellate Court.*—*Railroad Commission.*—*Rates.*—While the legislature may not prescribe administrative duties for the courts as such to perform, still, the question of the reasonableness of a railroad rate, fixed by the railroad commission, being a judicial question, the determination of such question may properly be lodged in the Appellate Court. p. 457.
14. **APPEAL AND ERROR.**—*Appellate Court.*—*Procedure.*—*Legislative Power.*—The legislature has the power to prescribe the procedure in cases in which it invests the Appellate Court with original jurisdiction. p. 459.
15. **CONSTITUTIONAL LAW.**—*Courts.*—*Delegation of Power to Non-Judicial Body to Hear Evidence and Report Decision.*—The legislature has power to delegate to the railroad commission the power to hear the evidence and render its decision on the question of the reasonableness of a railroad rate, and such decision on such question does not preclude the Appellate Court from an examination and determination of such question from such evidence, such proceeding being analogous to that of a master commissioner. p. 459.
16. **APPEAL AND ERROR.**—*Railroad Commission.*—*Motion to Dismiss Petition.*—The constitutional validity of the railroad commission law (Acts 1905, p. 83) will not be determined upon a motion in the Appellate Court to dismiss the petition before such commission, upon which the commission's action was founded. Wiley, J., *contra.* p. 460.

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From Railroad Commission of Indiana; *Union B. Hunt*, Chairman, *William J. Wood* and *C. V. McAdams*, commissioners.

Appeal by the Chicago, Indianapolis & Louisville Railway Company from the action of the Railroad Commission of Indiana in fixing a rate and prescribing the way-billing of cars. On motion to dismiss appeal. *Motion overruled.* (For final decision, see 39 Ind. App. —.)

E. C. Field and *H. R. Kurrie*, for appellant.

C. V. McAdams, for the commission.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, *amici curiae*.

ROBINSON, C. J.—This is an appeal to review the action of the Railroad Commission of Indiana in fixing a rate on coal, and also an order of the commission forbidding the way-billing of cars loaded with coal at their marked capacity when such cars would not hold the marked capacity when fully loaded.

This case arose out of proceedings taken by the commission under the act of the legislature approved February 28, 1905 (Acts 1905, p. 83, §5405a *et seq.* Burns 1905), entitled: "An act providing for the creation of a railroad commission, the appointment and compensation of the members thereof, prescribing the powers and duties of such commission and its members, prescribing certain duties and obligations of railroad companies, express companies and other common carriers, defining certain misdemeanors and prescribing penalties, providing for the collection of penalties by civil action from railroad companies and other common carriers by the State in cases therein provided for, appropriating money to carry out its provisions, providing for a review of the decisions of the commission and conferring jurisdiction on certain courts to hear and determine such proceedings, and repealing all laws and parts of laws in conflict therewith."

The first and second sections of the act create the commission, provide for the appointment of three commission-

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ers, prescribe the qualifications, terms and salaries of the commissioners, the organization of the commission and where its sessions may be held.

The third section vests the commission with power and authority to supervise all railroad freight and passenger tariffs; to regulate car service and the transfer of cars from one road to another, and to supervise charges therefor; to require and supervise the location and construction of sidings and connections between railroads, and the crossing of tracks and side-tracks of railroads by other railroads, vesting in the commission the authority now vested in the Auditor of State with reference to crossings and interlocking appliances; to supervise and regulate private car-line service and private tracks where the same are used in connection with any railroad in the State; to correct abuses and prevent unjust discrimination and extortion in freight and passenger tariffs on the different railroads, and to enforce the same by proceedings for the enforcement of penalties provided by law through courts of competent jurisdiction. The commission is also given power, upon failure of the railroads so to do, to fix and establish for all connecting lines reasonable joint rates of freight, transfer and switching charges; to fix the pro rata part of charges to be received by each of the two or more connecting roads, where such roads fail to agree; from time to time to alter, change, amend or abolish any classification or rate established by any company whenever found to be unjust or discriminative; to enforce reasonable and just rates for the use or transportation of loaded or empty cars and for storing and handling freight; to enforce reasonable rates for the transportation of passengers, and tolls or charges for all other service performed by any railroad company subject to the provisions of the act; to adopt and enforce such rules, regulations and modes of procedure as it may deem proper; to hear and determine complaints made against classifications or rates maintained by common carriers, or against

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the rules, regulations and determinations of the commission. This section also provides that its provisions shall be construed to mean that the commission shall have power to correct, alter, change or establish rates, charges, classifications, rules or regulations, where such companies fail to have just and reasonable and undiscriminative rates, charges, classifications, rules and regulations in effect, and shall exercise such power only where some person or corporation injuriously affected by such rate, charge, classification, rule or regulation, shall have filed with the commission a written verified complaint setting forth the unreasonable character of the rate, charge, classification, rule or regulation complained of, when the commission shall proceed to consider the reasonableness of the same and shall make such corrections, alterations, changes or new regulations, as may be necessary.

The fourth section provides for notice to the company, before rates or charges are revised or changed, for a hearing, that the commission may adopt rules to govern its proceedings, subpoena witnesses and order the production of books and papers, etc.

The fifth section reads: "In all actions between private parties and railroad companies or private car-line companies brought under this law, the rates, charges, orders, rules, regulations and classifications approved by or made by said commission before the institution of such action shall be held, deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein except as hereinafter provided until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections six, six and one-half and seven hereof."

The sixth section provides that if any railroad company or party in interest be dissatisfied with any rate, classification, rule, charge or general regulation made, such company or party may procure a complete transcript of all the

proceedings of the commission relative thereto, and also a copy of all the evidence heard, which evidence shall be incorporated into such transcript, and such company or party may file such transcript, with a concise written statement of its or his causes of complaint against the action of the commission, in the office of the Clerk of the Appellate Court, who shall, after certain requirements as to notice are complied with, "place said cause upon the docket of the said Appellate Court for hearing and determination. The commission shall be made a party to such proceeding in the Appellate Court, and shall defend the same. All such causes shall be given precedence over all other civil causes in said Appellate Court, and shall be heard and determined upon the transcript filed as aforesaid, as speedily as possible to the end that public interests may not suffer by reason of such appeal. Jurisdiction to hear and determine such appeals, and power to adopt rules of procedure to facilitate the speedy determination thereof not inconsistent with this act, are hereby conferred upon the Appellate Court of Indiana. The Appellate Court shall have power to affirm the action of the commission appealed from, or to change, modify or set aside the same as justice may require. The decision of the Appellate Court in any such matter shall be final, and said commission shall keep copies of all such findings and judgments on file in its office."

The sixth section further provides that if the company or party in interest be dissatisfied with any order or regulation respecting the location or construction of sidings, switches or connections between railroads, or the crossing of one railroad by another, or the transfer or switching of cars at junction points, or the regulation of private tracks, such company or party may file a petition in the circuit or superior court of the particular county, setting forth the objections to the order, and after the requirements as to notice are complied with the case shall be set for hearing, "and shall be heard and determined as a suit in equity,

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without a jury.” The court may affirm the action of the commission, or change, modify or set the same aside. Either party may appeal from the finding and judgment to the Appellate Court in the same manner that appeals are prosecuted in civil cases from judgments of circuit and superior courts.

Section six and one-half provides: “All orders of the commission made and entered upon its records as herein provided respecting rates, charges, rules, regulations and classifications, or respecting the location or construction of sidings or connections between railroads, or to the crossing of one railroad by another, or the transfer and switching of cars at junction points, or the regulation of private tracks, shall be operative and in full force at and from the time fixed therefor by the commission as hereinafter provided, until any such order shall have been changed, modified or set aside by a circuit, superior or appellate court under the proceedings provided for in section six of this act: Provided, however, that if at the time of filing a transcript” in the Appellate Court, appealing from the fixing of any rate, the company filing such petition may, upon filing a bond specified, charge and collect the rate that existed before the making of the order by the commission, until such proceeding is finally determined; and if the company files the bond and continues to charge the old rate it shall give each person paying the old rate a certificate showing the amount received and the rate charged and containing a promise to refund the difference if the new rate is sustained by the Appellate Court. A penalty is provided for failure to comply, within a fixed time, with the promises contained in the certificate.

The seventh section provides that in all trials under section six “the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them.”

Section eight requires the commission to furnish the company with a copy of rates, rules, etc., and provides that the company shall not increase its rates except after ten days' notice to the commission. The first paragraph of section nine provides a penalty for failure to produce books, and the second makes it a misdemeanor for any officer or agent to fail to produce books. Section ten makes it a misdemeanor to fail to file a schedule of rates. Section eleven provides for interrogatories by the commission to the companies; makes a failure or refusal to answer, a misdemeanor; provides for annual reports to the Governor; for notice in certain cases to interstate commerce commission, and for certain limitations of the carrier's liability. Section twelve provides that the commission, in making any examination or investigation provided for in the act, has power to issue subpoenas for the attendance of witnesses, each witness to receive per diem and mileage, and, if any witness fails or refuses to obey such subpoena, the commission may apply to a court to issue an attachment and compel him to attend; and if a witness after being duly summoned or ordered by any court shall fail or refuse to attend or to answer any question propounded to him, and which he would be required to answer if in court, such court may fine and imprison. A witness is not excused from testifying on the claim that the testimony may tend to incriminate him. The commission and all parties to any investigation shall in all cases have the right, in its or their discretion to issue proper process and take depositions, as in civil cases, instead of compelling personal attendance of witnesses. Section thirteen provides a penalty for violation of fixed rates. Section fourteen defines unjust discrimination, fixes a penalty and provides for reduced rates in certain cases. Section fifteen makes false billing and rebating misdemeanors. Section sixteen authorizes a civil action for damages suffered through the

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carrier's violation of the act. Sections seventeen and eighteen provide certain penalties. Section nineteen provides for admission in evidence of certified copies of rates made by the commission. Section twenty makes it the duty of the commission to see that this act and all railroad laws are enforced, and to cause to be instituted proper proceedings to prosecute violations.

Section twenty-one: "The terms 'road,' 'railroad,' 'railroad companies,' 'railroad corporations,' 'private car lines,' 'fast freight' or 'carrier,' as used herein, shall be taken to mean and embrace all corporations, companies, individuals and association of individuals, their lessees or receivers appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad or part of railroad in this State or any fast freight line or private car lines and express companies, and all such corporations, companies, and associations of individuals, their lessees or receivers that shall do the business of common carriers on any railroad in this State. (a) The provisions of this act shall be construed to apply to, and affect only the transportation of passengers, freight, express matter and cars between points within this State; and this act shall also apply to express companies: Provided, that this act shall not apply to street or interurban railroads, except as section three substitutes the railroad commission, created hereby for the Auditor of State, in respect to duties pertaining to the construction and maintenance of interlocking works at crossings of railroads and railroads operated by electricity."

Section twenty-two provides that the act "shall not have the effect to release or waive any right of action by the State or any person for the right, penalty or failure which may have arisen, or may hereafter arise under any law of this State; and all penalties accruing under this act shall be cumulative of each other, and a suit for or recovery of one shall not be a bar to the recovery of any other penalty."

Section twenty-three provides for certain reports and recommendations, by the commission, of road defects. Section twenty-four makes an appropriation to carry out the act. Section twenty-five repeals all conflicting laws.

The railroad commission moves to dismiss the appeal, on the ground, among others, that this court has no jurisdiction to hear such pretended appeal; that the appeal is not taken from the final judgment or decree of any court or body exercising judicial authority; that sections six and six and one-half of the act of 1905, *supra*, are in conflict with article three of the Constitution of Indiana. Appellant answers this motion by admitting the claim of appellee, that this court has no jurisdiction, and that the two sections named are invalid, but insists that the act is wholly void because, among other reasons, by section twenty-one, the act deprives certain railways of equal protection of the law. Appellant suggests that as there is a constitutional question involved the jurisdiction is in the Supreme Court.

The motions to dismiss are for want of jurisdiction in this court to determine the appeal. It is quite true that

this court has no jurisdiction of this appeal if the

1. provision of the statute giving the right of appeal is invalid. And it is equally true that, although the provision giving the right to appeal be valid, this court has no jurisdiction of the merits of the appeal if the body making the order from which the appeal is taken had no jurisdiction to make the order. It is elementary that if the subordinate body is without jurisdiction the appellate body cannot gain it by an appeal. The appeal has been brought to this court as the statute directs. Its decision is made final. And while this court has not, in general appeals, any authority to pass on the constitutionality of a statute, yet under this statute it has been given exclusive appellate jurisdiction, and must necessarily pass upon such questions as go to the powers of the court to determine the appeal. The case does not come to this court under the

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general enactments establishing the court and pre-
2. scribing its jurisdiction, but is brought under a special statute, which designates this court as the tribunal to determine finally certain controversies arising between the railroad commission and the persons or corporations with whom it has to deal. The legislature certainly could not have intended that the jurisdiction of this court should be final and conclusive in this particular class of cases, and at the same time limited to a part only of questions arising upon appeal. We cannot consider any question presented by the appeal if there is no valid provision authorizing an appeal, nor can we consider any questions presented if the appeal is taken from an order itself invalid, because made under authority attempted to be conferred by an invalid statute. The first question a court must consider in the determination of a cause is that of jurisdiction. The case originated and has been brought to this court by virtue of an express statutory provision. If there is no authority in the statute for the steps that have been taken, no such authority exists. If the statute is void it is as if it had not been enacted, and any proceeding had under it by any court or by any tribunal is just as ineffective as would be the same proceeding without any attempted statutory authority.

Section six authorizes the appeal if the party is dissatisfied with any rate, classification, rule, charge or general regulation made, approved, adopted or ordered by the commission. Complaint is made in this appeal of a rate made by the commission, and also of what should perhaps be called a rule made as to way-billing cars. But the argument is directed to the making of the rate.

In the able briefs filed by a member of the commission on behalf of the commission, and by counsel for appellant company, and by the Attorney-General, a thorough discussion is had of the nature of the duty performed by the commission in the proceedings prescribed for fixing a rate.

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Under the general railroad law the legislature granted to railroads authority “to regulate the time and manner in which passengers and property shall be transported,

3. and the tolls and compensation to be paid therefor.”

§5153 Burns 1901, §3903 R. S. 1881. Notwithstanding this grant of authority the legislature retains the right to regulate and to fix rates. *Railroad Commission Cases* (1886), 116 U. S. 307, 347, 6 Sup. Ct. 334, 29 L. Ed. 636. The legislature might exercise this right by itself fixing the rates; or it might delegate this duty to a

4. commission acting upon its own initiative; or it might leave with the railroads themselves the right to fix rates under the original grant of authority, subject to regulations and restrictions imposed by a commission, and subject always to the requirement that the rate fixed must be reasonable. In enacting the statute under consideration the legislature followed the last-named method. The carrier had the right before the passage of the act to fix rates, and it has that right under the act. It was required before the act to make rates reasonable; it is required to do the same thing now. If, before the

5. act, the carrier attempted to charge an unreasonable rate, the shipper could have redress through the courts. If the carrier attempts now to charge an unreasonable rate, a more prompt means of relief for such rate is given through a commission.

In determining whether a court may review the action of the commission in fixing a rate, the fact must be kept in view that the act gives the commission no power

6. whatever to correct, alter, change or establish rates, except upon the filing of a written verified complaint setting forth the unreasonable character of the rate complained of; a hearing is given upon the complaint, after notice, and after such hearing the commission shall make such corrections, alterations, changes or new regulations as may be necessary to prevent injustice and discrimination

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to the party complaining; and when any such rate shall have been changed such order shall operate for the benefit of all persons or corporations situated similarly with the complaining party and on the line of the railroad complained of. The question which the commission tries is whether the rate fixed by the railroad and of which complaint is made is a just and reasonable rate. If it is not, the commission may, upon the evidence heard, fix a rate that is just and reasonable. If it is, the rate as fixed by the railroad stands. In the determination of this question of fact, witnesses may be subpoenaed and compelled to testify, testimony must be taken in shorthand, and all written and documentary evidence and all pleadings and other papers pertaining to the hearing shall be kept on file so that a complete transcript of all such proceedings, including the evidence, may be made whenever required. Or the commission and all parties may take depositions instead of compelling personal attendance of witnesses, as depositions are taken in civil cases. The act also makes provision for the payment of witness fees, out of the state treasury, and for the payment of officers for executing process. In short, the act gives the commission all the authority necessary to make the investigation as to the facts complete. And all the evidence before the commission and upon which its decision is made is required by the act to be kept in the office of the commission.

In the above particulars the act differs materially from railroad commission acts in some other states, where the commission is given summary supervision of rates. See *Chicago, etc., R. Co. v. Minnesota* (1890), 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

So that, before the commission can grant any relief from the rate fixed by the railroad, it must first find that the rate of which complaint is made, and which was fixed by the railroad, is unjust or unreasonable. And in doing this in the manner prescribed by section three of the act, the

commission pursues methods in many respects quite like that followed by the court, before the passage of the act, in giving relief from an unjust or unreasonable rate of which complaint was made. The first step necessarily taken in the one case is not materially different from the first step necessarily taken in the other. However, a further duty is placed upon the commission, after it has found the rate complained of to be unreasonable, and that is to fix a rate that is reasonable, and the reasonableness of the rate fixed and the unreasonableness of the rate set aside are determined upon the same hearing.

Under points and authorities it is stated, in the original brief of appellee commission, that the most convincing reason that the commission is not a court is the fact

7. that it is given authority to fix rates, which is purely a legislative duty. In the brief in reply to the State's brief, the position taken by the commission is, that the power exercised by it in making rates is an administrative or executive power, and the argument in the same brief opens with the statement that "the Railroad Commission of Indiana, for whose members the writer speaks, is one of the coördinate branches of the State government." The manner in which the statute requires the commission to proceed in disapproving a rate complained of, and fixing another to take its place, sufficiently shows that the power exercised is neither altogether legislative nor executive, and we know of no authority in the legislature to create a department of the state government in addition to those named in the Constitution. While the statute does not make the commission a court, and it is not a court, yet the act of setting aside the rate complained of—and this must be done before another rate can be fixed to take its place—and fixing another, upon evidence introduced, upon a complaint filed—in fact, a trial had with the aid of judicial process—may properly be said to be the exercise of a quasi-judicial duty. In any event, the power exercised in this

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particular is more of a judicial than of an administrative character.

But whether the power exercised by the commission in fixing a rate is in its nature legislative, administrative or judicial is not decisive of the question presented.

8. It is conceded by counsel for appellee, in answer to appellant's argument, that without section six the rate fixed by the commission is conclusive and that, aside from any provision in this act, the courts are open to the carrier to prevent the enforcement of the order of the commission, if the rate established is unlawful. As the statute requires the rate to be just, reasonable and undiscriminative, if the commission fixes a rate that is not reasonable, its act is unlawful. A decision declaring the rate fixed to be unlawful, and whether unlawful because unreasonable, or unlawful because the statute was not followed in fixing it, is a judicial act, and is a question for the courts. It is not material by what delegated authority the rate is fixed, nor by what name the duty of fixing the rate is characterized, if the rate is unreasonable or unlawful the court will give protection against it. *Reagan v. Farmers Loan, etc., Co.* (1893), 154 U. S. 362, 367, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 4 Interst. Com. Rep. 560; *Chicago, etc., R. Co. v. Minnesota, supra*; *St. Louis, etc., R. Co. v. Gill* (1895), 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Smyth v. Ames* (1898), 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *Burlington, etc., R. Co. v. Dey* (1891), 82 Iowa 312, 48 N. W. 98, 31 Am. St. 477, 12 L. R. A. 436; *Chicago, etc., R. Co. v. Jones* (1894), 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. 278; *Atlantic Express Co. v. Wilmington, etc., R. Co.* (1892), 111 N. C. 463, 16 S. E. 393, 32 Am. St. 805, 18 L. R. A. 393.

In *Reagan v. Farmers Loan, etc., Co., supra*, the court said: "It has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the

courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation.

* * * These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole), operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation."

So that, when the unreasonableness or unlawfulness of the rate is thus brought before a trial court, it is tried and

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determined by the court as other questions of law
 9. and fact. And if, after a hearing, the court concludes that the rate is unreasonable, or that it has not been fixed according to law, or that it has not been fixed under a law authorizing its establishment, it may in effect set the act of the commission aside by restraining its enforcement. The determination of these questions is clearly the exercise of judicial authority. The question then presents itself: May the legislature require that a court shall determine these same questions, not by a trial, but by a review of all the proceedings and evidence taken by the commission? Whether it is, strictly speaking, an appeal within the generally accepted meaning of the term, is not conclusive, but the question is, may the legislature require that the question be determined in that way?

It is well settled that, under a general statutory provision providing for an appeal from all decisions of the board of county commissioners, an appeal may be taken from any order of the board, if the duty of the board involves judicial action, unless the right of appeal is expressly or impliedly denied by the statute creating the duty. And it is also settled that an appeal will not lie under this general provision if the duty of the board does not involve judicial action, but consists in the performance of administrative, ministerial or discretionary powers. However, an appeal will lie from the action of the board where the only power exercised by the board is administrative, ministerial or discretionary, if an appeal is expressly authorized by statute. See *Bosley v. Ackel-*

10. *mire* (1872), 39 Ind. 536; *Moffitt v. State, ex rel.* (1872), 40 Ind. 217; *Baltimore, etc., R. Co. v. Board, etc.* (1880), 73 Ind. 213; *Grusenmeyer v. City of Logansport* (1881), 76 Ind. 549; *Padgett v. State* (1884), 93 Ind. 396; *City of Terre Haute v. Mack* (1894), 139 Ind. 99; *Board, etc., v. Davis* (1894), 136 Ind. 503, 22 L. R. A. 515; *Mode v. Beasley* (1896), 143 Ind. 306.

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Thus appeals are authorized in highway cases, in drainage proceedings, street assessments, the action of purely administrative boards, and in other matters where the action of the tribunal from which the appeal is authorized is in no sense judicial. It is quite true that these cases go to a trial court upon such appeal and are tried as original actions. But these cases go to this point: That whether an appeal will lie from the action of an inferior tribunal or statutory board may or may not depend upon the capacity in which the tribunal or board acts in doing the thing required of it, but it may depend entirely upon whether the legislature has said that there may be an appeal.

The legislature established the Appellate Court under the authority given by §1, article 7, of the Constitution, which provides that “the judicial power of the State
11. shall be vested in a Supreme Court, in circuit courts, and in such other courts as the General Assembly may establish.” It is manifest that the act in force February 28, 1891 (Acts 1891, p. 39), establishing the Appellate Court, invested the court with appellate jurisdiction only. By the first section of that act it was given jurisdiction of appeals from the circuit, superior and criminal courts in certain designated classes of cases. The clerk and sheriff of the Supreme Court are made the clerk and sheriff of the Appellate Court, and the judges of the Appellate Court were required to adopt the same uniform rules of practice as govern the Supreme Court. Appeals were required to be taken to the Appellate Court in the same manner as to the Supreme Court, and pleadings, practice and proceedings in the two courts were to be the same. The act did not create any new appellate jurisdiction, but simply took a part of the general appellate jurisdiction then existing and transferred it to the Appellate Court which the act created. The act did not undertake to confer upon the court any original jurisdiction and conferred none; and under that act the court had no original

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jurisdiction, except such as the court should necessarily exercise in aid of its appellate jurisdiction—an inherent power of all appellate tribunals. Prior to 1905 various amendments touching the court's jurisdiction were made to the original act, and by the act in force March 12, 1901 (Acts 1901, p. 565, §9, §1337i Burns 1901), all appellate jurisdiction was vested in the Appellate Court except in nine classes of cases, jurisdiction of which remained in the Supreme Court. But in none of these amendatory acts was any attempt made to confer any original jurisdiction, and none was conferred.

However, as this court is established by the legislature, the legislature has, within the constitutional limitations as

to the judiciary, full power to define its procedure

12. and jurisdiction. "It is true," said the court in

Hovey v. State, ex rel. (1891), 127 Ind. 588, 11 L. R. A. 763, 22 Am. St. 663, "that the legislative department may increase, or diminish, the jurisdiction of the [Supreme] Court, and may, within the terms of the Constitution, prescribe rules of practice." It is equally true that the legislature may confer upon a court of its own creation either appellate or original jurisdiction, or both. Brown, Jurisdiction (2d ed.), §13. There is nothing in the Constitution that restricts its jurisdiction. The fact that it is called an "appellate court" and was created as a court of appeals, and that, strictly speaking, an appellate court can review a decision of a court only, does not preclude the legislature from conferring upon it jurisdiction other than strictly appellate jurisdiction. The question is whether the particular duty placed upon the court is a judicial duty.

The sixth section of the act in question expressly provides that the secretary of the commission shall, upon request, furnish a complete transcript of all the pro-

13. ceedings of the commission relative to the action appealed from, also a copy of all the evidence which

shall be incorporated into such transcript. This transcript is filed in the office of the clerk of this court, who docket the same for hearing and determination. Jurisdiction is conferred to hear and determine the appeal, which is given precedence over other civil causes, and the cause "shall be heard and determined upon the transcript filed as aforesaid." It is clear that the legislature did not intend that there should be a trial in this court, in the ordinary meaning of that term.

It is true that section three says that this court upon the appeal may "affirm, change, modify or set aside" the action of the commission. Whether the court would, upon final judgment, have power to change or modify a rate fixed by the commission is not now presented. But it is manifest that the court might, as a court, determine whether the rate was legally established or whether it was established under a law authorizing it, and affirm or set aside the action of the commission in fixing the rate; and neither more nor less than this is done when the question of the unreasonableness of the rate is heard by a trial court. If the action of the commission should be affirmed, the rate is fixed, not by the court, but by the commission. The power to change or modify a rate is not at all essential to the power to affirm or set aside the order of the commission. It is quite true that it is an elementary principle that "upon judges as such no functions can be imposed except those of a judicial nature." Cooley, Prin. of Const. Law, 53. And see *Ex parte Griffiths* (1888), 118 Ind. 83, 3 L. R. A. 398, 10 Am. St. 107; *City of Terre Haute v. Evansville, etc., R. Co.* (1897), 149 Ind. 174, 37 L. R. A. 189. But determining whether a rate has been legally established or whether the same is or is not reasonable, is a judicial function.

If, then, the duty to be performed is judicial, may the legislature prescribe the procedure? It cannot be said that

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necessarily the only question that would be presented by this transcript would be the weight of the evidence. The power possessed by the commission is only such as the statute gives it. The method by which it is to proceed is pointed out. If this method is not pursued, its action is a nullity. The whole proceeding is a special, statutory one, and certain steps must be taken before the commission has any authority to proceed. Until the contrary appeared, the same presumption would prevail in favor of the action of the commission that prevails in a review of a judgment in a civil action. It is quite true, as argued, that it is not to be presumed that the commission would fix an unreasonable rate. But may it not also be said that it is not to be presumed that a court will render a wrong judgment? Does not the same reason for a review exist in both cases?

It is also argued that this provision in this act delegates to the commission—a nonjudicial body—the duty of hearing the evidence upon which a court is to render a decision. Even if it could be said that the only question that would necessarily be presented by the transcript would be on the weight of the evidence, and as stated, this would not necessarily be the only question, this objection to the manner of hearing the evidence would not be tenable. A case may be tried in the circuit court upon evidence consisting wholly of depositions taken by a notary public. A circuit court may refer a case to a master commissioner, to whom judicial power cannot be given (*Shoultz v. McPheeters* [1881], 79 Ind. 373), and make a finding from the evidence so taken, or pronounce a judgment upon a finding of facts made by the master from the evidence heard by him.

Our conclusion upon this branch of the case is that the legislature, in providing for an appeal to this court, has required of this court the performance of a judicial duty that may rightfully be imposed; that the legislature may

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vest the court with such jurisdiction as it sees fit, provided the duty required is a judicial duty; that in determining upon an appeal, whether the rate fixed by the commission has been established in due form of law, under a valid law and by a valid commission, and whether the rate fixed is a reasonable rate, the court is required to exercise judicial authority only. If the legality, or the reasonableness of a rate fixed by the commission may be questioned in a court, and it is so conceded and has been so decided, we think the legislature may designate the court in which, and the procedure by which, that review may be had. For the reasons given, the motion of appellee commission to dismiss the appeal is overruled.

Counsel, in support of appellant's motion, have discussed at length the constitutionality of the act, claiming that it is unconstitutional, among

16. other reasons, on the ground that it empowers the commission to fix a rate before the reasonableness of such rate has been judicially determined, and on the ground that interurban roads are exempt from the provisions of the act. Appellant's motion is not to dismiss the appeal, but to dismiss the petition. The petition or complaint is not filed in this court, but comes to this court in the transcript of the proceedings of the commission. It is a part of the transcript filed in this court. If the act is invalid, as appellant insists, it is true that the commission has no authority to act, and from that it would necessarily follow that this court could have no jurisdiction of the appeal. Whether any motion in this court to dismiss a petition filed with the commission would be a proper motion to be considered by this court at any time we need not now determine. But, as to the motion now presented by appellant, the effect of a ruling in its favor upon the questions argued in support of its motion would be a determination of the appeal upon its merits. It is true, if the act is invalid, any act of the commission

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under its provisions would be without authority of law, and, in the consideration of the appeal on its merits, the constitutionality of the act would be the first question to be determined, but that question can not be raised by a motion to dismiss the petition.

The motion to dismiss the appeal is overruled.

Comstock, P. J., Roby, Wiley and Myers, JJ., concur.

Wiley, J.—I concur in the conclusion that an appeal will lie to this court from the action of the railroad commission, and think the motion to dismiss the appeal is correctly overruled. I entertain the further opinion that appellant's motion to dismiss the petition presents the constitutionality of the act creating the commission, and that it is a matter of such importance it ought now to be decided.

DISSENTING OPINION.

BLACK, J.—The railroad commission is an administrative board, and not a court. Whatever may be said properly as to the theoretical nature of the elementary functions or powers of government involved in the making of an order by that board to correct, alter, change or establish a rate, charge, classification, rule or regulation upon complaint setting forth the unreasonable character of a rate, charge, classification, rule or regulation of a railroad company or an express company, the commission in the performance of such duty does not act in a judicial capacity, though the prescribed modes of procedure resemble in some respects those of a court, and though in the performance of the duty the commission must consider the question as to the reasonableness of the rate, charge, classification, rule or regulation concerning which complaint is made, and must decide what is, in the particular instance, reasonable. The question as to what is a reasonable rate, etc., is in its nature a question of fact, and merely because an administrative board in the discharge of its duties must consider and decide such a question it does not thereby be-

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come a court, and as to the determination of such question it is not acting in a judicial capacity. The result of the proceedings of the commission under the statute is an official administrative arrangement, and not a judicial decision. If when the decision upon a question of reasonableness is made by a court it is to be treated as a judicial question, it does not necessarily follow that it is to be so treated when it occurs in an administrative matter in the manner in which it constantly enters into the making of expedient regulations by administrative officers in general. As said by Cooley, J., in *Weimer v. Bunbury* (1874), 30 Mich. 201: "Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative." An officer or a board is not judicial in the true sense of the term merely because he or it performs duties which when performed by a court are regarded as judicial duties. "If it were otherwise it would be almost impossible to conceive of an office not judicial, inasmuch as all officers, whatever their class or rank, are required to exercise functions and perform duties which in their nature are judicial." 1 Elliott, Gen. Prac., §205, and authorities cited.

If a court render a judgment in a cause wherein it has jurisdiction, the legislature cannot set it aside and grant a new trial, or substitute its own decision for that of the court. Yet it cannot be doubted that though the railroad commission, pursuant to the statute, should fix a rate for a particular railroad, and there should be no appeal from the action of the commission, the legislature might by its subsequent enactment make a different rate for railroads which would supersede the future operation of the regulation made by the commission.

Whatever may be the correct conclusion upon the question as to the authority of the legislature to confer upon the Appellate Court original jurisdiction in a particular class of cases, or to require it to try and determine *de novo*

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after the railroad commission such a matter as that here presented, the General Assembly intended in this instance to confer upon that court jurisdiction to examine, not the rate—it is made by the railroad company—but the action of the commission by consulting a transcript of its proceedings, and to affirm the action of the commission or to change or modify it or set it aside, as justice may require, the authority so conferred being spoken of in the statute as jurisdiction to hear and determine an appeal. It was not the intention to confer or impose original jurisdiction upon this court as a judicial body. The legislature, it may perhaps be supposed, intended that we should perform our assigned part acting in the capacity of a court of appeals. If we are to proceed only in the capacity of a court of appeals, without original jurisdiction, we must review only judicial determinations of a subordinate court, upon a record importing the absolute verity of the record of a judgment. Appellate judicial authority implies original judicial action over which such authority may be judicially exercised.

The word "appeal," when properly used as a term of the law, means the removal of a case from one court to another court. "The matter of appeals is essentially and throughout judicial, and there can, in legal contemplation, be no appeal when there is no decision by a judicial tribunal. Two things are essential, the decision of a judicial tribunal of original jurisdiction, and a superior court invested with authority to review the decision of the inferior tribunal." Elliott, App. Proc., §15. In the next section of the same book it is said: "Appellate jurisdiction is the authority of a superior tribunal to review, reverse, correct, or affirm the decisions of an inferior judicial tribunal in cases where such decisions are brought before the superior court pursuant to law. * * * Judicial power resides in courts, and hence it is essential that the original, as well as the appellate decision, should be made by a court." Elliott, App. Proc., §16.

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"In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised." 2 Story, Constitution (5th ed.), §1761.

"Appellate jurisdiction, *ex vi termini*, implies a resort from an inferior tribunal of justice, to a superior, for the purpose of revising the judgments of the inferior tribunal." *Smith v. Carr* (1808), Hardin (Ky.) 305.

To constitute appellate jurisdiction, properly so called, as distinguished from original jurisdiction, the decision to be reviewed must be a decision made by a court properly so designated, and not simply a decision of a body with quasi-judicial authority. Elliott, App. Proc., §17.

"The jurisdiction of an appellate tribunal is not exercised over ministerial or administrative officers directly, for when it exercises such authority it proceeds as a court of original jurisdiction." Elliott, App. Proc., §20.

"The power of the appellate court necessarily includes the power not only to reverse the judgment, but also, to control and direct the subsequent action of the subordinate court." *Piqua, etc., Bank v. Knoup* (1856), 6 Ohio St. 342, 349. And see *Dodds v. Duncan* (1884), 80 Tenn. 731.

The power resides in every appellate tribunal to coerce obedience to its orders, writs and mandates. Elliott, App. Proc., §22.

"Jurisdiction is original when it is conferred on the court in the first instance." 21 Am. and Eng. Ency. Law (2d ed.), 1009, note.

When a cause decided in one tribunal is removed to another and there tried *de novo*, the latter court is not concerned with errors committed by the former, but exercises authority in the nature of original jurisdiction, notwithstanding the method of bringing the cause before it.

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Under our system of jurisprudence, where questions are submitted to the decision of an administrative body, and an appeal from such body is authorized by the legislature, the jurisdiction so conferred on the court to which the appeal is thus authorized has been treated as in the nature of original jurisdiction, and not as being appellate jurisdiction, strictly so called, and the investigation of the court takes the form of an original investigation, and not that of an appellate review of the record of a judgment.

When the legislature has authority to create a court, and, without any constitutional restriction, to prescribe its jurisdiction, it may judge for itself, however wisely or unwisely, upon the question as to the propriety of conferring original jurisdiction in one class of cases and appellate jurisdiction in other cases, and it may prescribe the manner of instituting the causes and the methods of procedure therein. To constitute original jurisdiction, the court must take cognizance of the case as an original cause.

The order of the railroad commission from which the appeal is authorized by the terms of the statute is not vacated by the appeal, but it remains operative and in full force until changed, modified or set aside by a circuit, superior or appellate court, though its operation may be suspended by the filing of a bond as provided in section six and one-half (Acts 1905, p. 83, §5405g Burns 1905), without involving the exercise of any power of the court except in the fixing of the amount of the bond and in the approval of the surety.

An appeal, in the strict sense of the term, cannot be granted by the legislature directly from a purely administrative body to a court which is limited by the Constitution to appellate jurisdiction. Therefore, appellate jurisdiction, properly so called, cannot be conferred on any court by the authorizing of an appeal directly from such a body.

In *Hubbell v. McCourt* (1878), 44 Wis. 584, it was held that the appellate power of the supreme court of Wis-

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consin, conferred by the constitution, could not be extended to acts or decisions of officers or persons not acting as a court, and that the legislature could not compel the court to take jurisdiction of and determine appeals taken directly from orders made by judges in chambers.

In *Auditor of State v. Atchison, etc., R. Co.* (1870), 6 Kan. 500, 7 Am. Rep. 575, the appeal was taken pursuant to a statute by the auditor of state from the appraisal of the property of a certain railroad company made by the board of county clerks. On motion of the railroad company the appeal was dismissed. The legislature was under the constitutional restriction that the jurisdiction conferred on the court must be appellate, not original. It was said: "It would be absurd to claim, that it is in the power of the legislature to clothe this court with authority to review acts purely executive in their character, by giving an appeal therefrom to this court. Many of the duties which the executive is called upon to perform require great care and judgment in deciding how to act. Yet when the decision is made an appeal could not be given to this court, for that would give to the court executive powers as well as judicial."

In *Hestres v. Brennan* (1875), 50 Cal. 211, it was held that the secretary of the interior, who had authority to approve, modify or annul the acts, proceedings and decisions of the commissioner of the general land office, exercised, in revising the acts of the commissioner, "supervisory, rather than appellate power, in the sense in which the term appellate is employed in defining the powers of the courts of justice."

The judicial power, which every court possesses, is not created or given by the legislature. When, in the exercise of its constitutional authority, the legislature creates the court, though it may be abolished by the same authority, yet while it continues to exist it is invested with judicial power by the constitution which authorized its creation.

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By virtue of the same organic law, the legislature has no authority to confer or to impose upon a court any other than judicial functions or duties. The independence of the judiciary cannot be thus destroyed or impaired.

The railroad commission is put in motion by the filing of a complaint by some person or corporation injuriously affected, setting forth the unreasonable character of the rate, charge, classification, rule or regulation complained of, and after a hearing the commission is required to make such corrections, alterations, changes or new regulations, or any part thereof, as may be necessary to prevent injustice and discrimination to the party complaining, the order of the commission operating for the benefit of all persons or corporations situated similarly and on the line of the railroad. The complaint of the injuriously affected person or corporation filed with the commission operates merely as a necessary suggestion, and cannot be regarded as a pleading whereby a judicial proceeding is instituted. The person or corporation thus putting the commission in motion need not be a party to the so-called appeal to this court. For the institution of the contemplated proceeding in this court, any railroad company or other corporation or party in interest, dissatisfied with any rate, classification, rule, charge or general regulation, made, approved, adopted or ordered by the commission, is to procure a transcript of the proceedings of the commission, and, if he or it so desires, a copy of the evidence, and the dissatisfied company or party is to file such transcript in the office of the clerk of this court, and with it the dissatisfied company or party is to file a concise written statement of its or his causes of complaint against the action of the commission, making the railroad company a defendant thereto. The cause in this court is to be "heard and determined" upon the transcript so filed. Upon such hearing this court is to make a decision which shall be a final decision of the matter heard, and is given power to affirm the action of the commission,

or to change, modify or set aside the same, as justice may require. That is to say, the court's functions are the same as those of the commission, except that the latter, moved by the complaint of one injuriously affected, acts upon the rate, charge, classification, rule or regulation made by the railroad company, while the court, upon the complaint of some dissatisfied person or company, is to act on the rate, classification, rule, charge or general regulation made by the commission, and the commission hears and determines upon information originally furnished to it, while the court is confined to the information furnished by the transcript. The same criterion, that of the justice of the rate, etc., is to govern the determination of the commission and that of the court.

It does not appear to be contemplated that the court shall make any mandate to the commission, or that it shall remand the matter to the commission for further proceedings or for any purpose, and it is not required that its action shall be certified to the commission. The decision of the court is final, and the commission is directed to keep copies of all such findings and judgments on file in its office.

If we, on the hearing upon the information furnished by the transcript, should be unwilling to affirm the action of the commission, that is, to approve the rate, etc., ordered by it, we are not directed to reverse a decision of the commission, but the statute provides that we may affirm, change, modify or set aside, as justice may require. In view of the provision that our decision shall be final, it is intended that it shall furnish the regulation which is to control the railroad company, and it cannot be supposed that we are to stop with merely setting aside the action of the commission which we do not affirm. It is contemplated, and, if we are to make a final adjustment as required, it is necessary, that when we cannot approve the commission's rate, etc., we shall not merely set aside the

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commission's action, but we shall state such a rate, etc., as justice may require, by changing or modifying the rate, etc., designated by the commission. It cannot be supposed that we would be given power to approve or set aside the rate, and also to make a finality, as justice may require, of the matter concerning which complaint is made to us, without exercising the power expressly given to change or modify the rate, etc., under consideration. Indeed, it is impossible for us to exercise official power and thereby take the final action required by justice without having and exercising the power to change or modify the rate, etc., made by the commission. In short, we cannot take any action as contemplated by the statute without acting administratively.

It would seem that the actual purpose of the statute is an attempted investment of a court of appeals with administrative functions which would in effect make it an additional railroad commission with modified procedure and without proper facilities. It is certain that we cannot perform what by the statute is contemplated, and that without which we would not have been given any of the authority which it attempts to confer, unless we are to exercise power not pertaining to a court.

For the foregoing reasons I am of the opinion that the appeal should be dismissed. Having arrived at the conclusion that this court has no jurisdiction in the premises, I cannot regard it as proper to go further into the question as to the authority of the railroad commission.

ADDITIONAL DISSENTING OPINION.

[Filed December 27, 1906.]

BLACK, J.—When this case was before the court upon the motion of the appellee to dismiss the appeal, and the motion of the appellant to dismiss the complaint filed with the railroad commission, there was scarcely sufficient time for the proper examination of the important subject, the

matter being somewhat hastily decided because it was deemed proper to dispose of those motions before our summer vacation.

After an opportunity to examine the opinion of the majority filed on the former hearing and the authorities cited therein, it seems proper to add something to what was said on that hearing concerning the character of the commission's authority and this court's jurisdiction.

It is said in that opinion of the majority: "While the statute does not make the commission a court, and it is not a court, yet the act of setting aside the rate complained of—and this must be done before another rate can be fixed to take its place—and fixing another, upon evidence introduced, upon a complaint filed—in fact, a trial had with the aid of judicial process—may properly be said to be the exercise of a *quasi*-judicial duty. In any event, the power exercised in this particular is more of a judicial than of an administrative character."

The rate fixed by the carrier is set aside by the commission only in and by changing it. The decisions of the Supreme Court of the United States, cited later in that opinion, clearly are to the effect that the prescribing of changes of rates fixed by the carrier is a function to be exercised by the legislature by its own action or through its instrumentalities, and not by the courts. The provisions of our statute concerning the methods of the commission in gaining the information upon which it is to act are not all mentioned in the opinion of the majority in this connection. By section eleven the commission is given power to elicit all information deemed by it necessary to the hearing and consideration of any complaint made to it. It may submit blanks or interrogatories for eliciting information necessary to the consideration and determination of any and all questions over which it has jurisdiction. It "may use such other means or methods of securing such information as may be deemed expedient by it."

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However nearly the commission may imitate, or be expressly authorized to imitate, the proceedings in courts of justice, its action in changing rates cannot be regarded or treated as the action of a court or as the exercise of the judicial power. The question as to the reasonableness of a rate, whether fixed by the railroad company or by the railroad commission, may become a judicial question in a suit in equity, or sometimes in an action at law, but the court in such suit or action cannot assume to itself, or be given by statute, the authority to prescribe a rate in place of the one thus brought in question. It was said in the quotation in the principal opinion on the former hearing herein from *Reagan v. Farmers Loan, etc., Co.* (1893), 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014: "The province of the courts is not changed, nor the limits of judicial authority altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between carriers and the shippers; they do not engage in any mere administrative work. * * * These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property."

That case was a suit instituted in the circuit court of the United States to restrain the enforcement of rates fixed by the railroad commission of Texas. The defendant denied the power of the court to entertain an inquiry into the matter, insisting that the fixing of rates for carriage by a

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public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the government; and it was in response to this proposition that the remarks of the court were made which are quoted in the opinion of the majority in the case at bar.

In *Chicago, etc., R. Co. v. Minnesota* (1890), 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, which was a writ of error to review a judgment awarding a writ of mandamus, it is said in the concurring opinion of Mr. Justice Miller: "The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered." It was further said that in the proceeding by mandamus against the railroad company, "which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery." Mr. Justice Bradley (Mr. Justice Gray and Mr. Justice Lamar concurring) was of the opinion that when the legislature or its railroad commission had fixed a tariff of fares and freights, the matter could not become a judicial question. In his dissenting opinion he said on page 464: "Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights which a legislative committee has. It might, or might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have

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the widest scope for examination and inquiry. * * * Such a body, though not a court, is a proper tribunal for the duties imposed upon it.”

St. Louis, etc., R. Co. v. Gill (1895), 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484, was an action to recover judgment for penalties for charging and receiving fares in excess of the rate per mile fixed by statute.

Railroad Commission Cases (1886), 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, were suits to enjoin the railroad commission of Mississippi from enforcing against certain railroad companies the provisions of the railroad commission statute of that state.

In *Smyth v. Ames* (1898), 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, and other cases decided at the same time, the plaintiffs sought a decree enjoining the enforcement of certain rates of transportation, upon the ground that the statute prescribing them was repugnant to the Constitution of the United States.

Burlington, etc., R. Co. v. Dey (1891), 82 Iowa 312, 48 N. W. 98, 31 Am. St. 477, 12 L. R. A. 436, was a suit to enjoin a railroad commission from establishing joint rates for certain railroad companies.

Chicago, etc., R. Co. v. Jones (1894), 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. 278, was an action in debt to recover from a railroad company penalties for alleged overcharges of freight in excess of rates fixed by a railroad commission.

In *Atlantic Express Co. v. Wilmington, etc., R. Co.* (1892), 111 N. C. 463, 16 S. E. 393, 32 Am. St. 805, 18 L. R. A. 393, there was an appeal from the railroad commission to a county court and an appeal from that court to the supreme court. In the statute, the commission was expressly “created and constituted a court of record;” but it was held in *Caldwell v. Wilson* (1897), 121 N. C. 425, 28 S. E. 554, to be an administrative court, and not a judicial court. And in *Pate v. Wilmington, etc., R.*

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Co. (1898), 122 N. C. 877, 29 S. E. 334, it was held that the commission was (somewhat like the board of county commissioners) an administrative court; that its orders and regulations were merely the basis of judicial action in the superior court to enforce them or to punish their violation; and, though the statute provided for an appeal directly from the commission to the Supreme Court, it was held that if the latter court entertained such appeal it would be assuming original jurisdiction of a matter as to which, though heard and determined by a board of competent jurisdiction, there had been no judicial adjudication of its validity nor proceedings to punish its violation, whereas the jurisdiction of the Supreme Court was appellate only except in claims against the state. Accordingly, the appeal was dismissed.

In *State, ex rel., v. Minneapolis, etc., R. Co.* (1900), 80 Minn. 191, 83 N. W. 60, which was an appeal in a proceeding for a writ of mandamus, the statute there referred to which provided for an appeal authorized the appeal to the district court, and provided that “‘upon such appeal, and upon the hearing of any application by the commission or by the attorney-general, for the enforcement of any such order made by the commission, the district court shall have jurisdiction to, and it shall, examine the whole matter in controversy, *including matters of fact* as well as questions of law, and to affirm, modify or reverse such order in whole or in part as justice may require,’” and that “‘the remedies herein provided for shall be in addition to all existing legal and equitable remedies.’” It was said by the court that no effect would be given to the language italicised, “if it was not intended that in a proceeding like this, to enforce an order made by the commission, there should be just such a trial as there would be if an appeal had been taken from the order. On such appeal, the court will examine matters of fact to ascertain whether there is any evidence reasonably tending to

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support the disputed findings of fact, taking evidence *de novo*." See, also, *Minneapolis, etc., R. Co. v. Minnesota* (1902), 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; *In re Railroad Commissioners* (1884), 15 Neb. 679, 50 N. W. 276; *Board, etc., v. State, ex rel.* (1897), 147 Ind. 476, 495.

It is said in the opinion of the majority of this court in the case now before us: "The question then presents itself: May the legislature require that a court shall determine these same questions, not by a trial, but by a review of all proceedings and evidence taken by the commission?"

Reference is then made to a class of cases where an appeal is always tried *de novo*, the court to which the appeal is taken assuming to act only as a court of original jurisdiction in such cases. It is then argued that it is within the province of the legislature to confer original jurisdiction upon this court, or "jurisdiction other than strictly appellate jurisdiction," which, of course, can properly mean nothing but original jurisdiction. Yet it is said, further, that "it is clear that the legislature did not intend that there should be a 'trial' in this court in the ordinary meaning of the term"—a statement in which I concur. The court then indicates its belief that the function of this court under the statute is only to review the case upon the transcript as a court of appellate jurisdiction, for the correction of errors, the same presumption prevailing in favor of the action of the commission that prevails in a review of a judgment in a civil action. It is not clearly stated that this court is not to weigh the evidence, but it is stated that it cannot be said that the only question presented would be the weight of the evidence, and that, if the contrary could be said, the objection that the statute delegates to a non-judicial body the duty of hearing the evidence upon which a court is to render a decision would not be tenable, the instances mentioned being of the taking of evidence under a court's own sanction for its use in rendering a judicial de-

cision, on appeal from which the evidence would not and could not be weighed by the appellate court (*Parkison v. Thompson* [1905], 164 Ind. 609; *Pence v. Garrison* [1884], 93 Ind. 345, 354), while in the present instance the evidence is taken by the nonjudicial body for its own use by way of providing itself in part with the information on which it acts.

The majority not only said that this court has been given exclusive "appellate jurisdiction," but the court refused to consider at that stage of the case the motion of the appellant to dismiss the complaint, saying that it was not filed in this court, but came to it in the transcript of the proceedings of the commission. If this court had been regarded as having the case before it as an original case, it, of course, could have taken up that motion when it thus refused to do so.

It is said that this court is designated as the tribunal to determine finally certain controversies arising "between the railroad commission and the persons or corporations with whom it has to deal;" and it appears that the majority treated the case as before this court for its action as a court of appellate jurisdiction only, though it foreshadowed a disposal of the appeal as if upon the theory that this court, instead of having the power to render judgment as directed by the terms of the statute, and as intended by the legislature, had the authority to dispose of the case much in the way in which such a matter might be determined upon an original judicial investigation of the question as to the reasonableness of the rate fixed by the commission.

In seeking to construe and apply the statute in question, the manifest intention of the legislature should be kept constantly in view, and it should be assumed that the legislature intended to employ the terms of the statute in the sense in which they are and have been understood and applied. From the beginning of the judicial history of this State it has been uniformly the usage of the legislature and

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the practice of the courts to employ and apply the term "appeal," when used with reference to the removal of a proceeding from a court not of record, or from an inferior court of limited or merely statutory powers, or from an administrative body or officer, having *quasi*-judicial authority, to a court of record, in such a sense as to require that court to take original jurisdiction and to try the matter *de novo*, according to the methods and with the powers which obtain in courts of justice; but when the legislature provided for the hearing and determination of the appeal here in question upon the transcript of the record of the commissioners, it cannot be doubted that the law-making body did so having in view the method of taking appeals from the circuit courts to the Supreme Court and the Appellate Court, and intended that this record should be treated by the Appellate Court as having the same qualities and effect as the record of a court of general, superior jurisdiction.

The statute, upon careful reading, indicates the intention of the legislature to confer in such a case as that before us appellate jurisdiction, and not original jurisdiction. This court is to hear and determine the appeal upon the transcript of the proceedings of the commissioners. In the same section which makes these provisions for appeal, provision is made also for a proceeding of another kind, whereby, in case of dissatisfaction with certain orders of the commission, the dissatisfied company or party may file a petition in the circuit or superior court, making the commission a defendant, the cause to be heard and determined as a suit in equity, without a jury. It was clearly the intention to recognize this court as a court of appeals, and to confer upon it appellate jurisdiction, and not original jurisdiction, in cases to be removed to it from the commission.

The legislature cannot invest this court with judicial duty as a court of appeal for the correction of errors, except in cases which have been decided by judicial courts, prop-

erly so called. In that capacity we can review only judicial decisions, not questions, whatever their nature, which have been before only bodies which are not courts.

It need not be said in this case that this court might not be given original jurisdiction to determine judicially the question as to the reasonableness of a rate fixed by the railroad commission. It has not been given such jurisdiction.

Without authority to take evidence *de novo*, and to proceed as in an original case, there cannot be an examination according to judicial methods; and, if the decision of this court on such an appeal as this is to have the conclusive effect of a judgment, the parties in interest will be deprived of a judicial investigation according to the principles and rules of law and equity.

If there had been a mere allowance of an appeal, the question would have arisen whether this court might not take thereunder original jurisdiction and have a trial *de novo*. But the legislature did not leave opportunity so to apply the word "appeal" used by it; on the contrary, it designated the procedure in this court. See *Hays v. Merchants Bank* (1895), 10 Wash. 573, 39 Pac. 98.

We cannot treat the action of the commission as merely *prima facie* correct. No method is provided for meeting in this court a *prima facie* case. If the information on which the commission proceeds, so far as it is shown by the transcript, merely tends to support the commission's decision, its determination, by the requirements of the statute, would be conclusive here. Can one who has passed through such a nondescript proceeding be said to have had his day in court?

This opinion, to supplement my former dissenting opinion, is filed at this time because my service on the bench of this court will terminate at the end of this month and before the final hearing of the pending cause.

OAK HILL CEMETERY COMPANY v. WELLS.

[No. 5,809. Filed June 28, 1906.]

1. **CONSTITUTIONAL LAW.—Taxation.—Exemptions.—Powers of Legislature.**—The legislature has no power to exempt property from taxation which is not exempted by the Constitution. p. 481.
2. **SAME.—Taxation.—Cemeteries.**—The framers of the Constitution did not look upon the family burying-ground nor the churchyard as property, and such are exempt from taxation within the spirit of the Constitution. p. 481.
3. **TAXATION.—Exemption from.—Burden of Proof.**—The burden is upon the person claiming property as exempt from taxation to establish that such property is within the exemptions defined by the Constitution. p. 482.
4. **SAME.—Cemeteries.—Used for Gain.—Statutes.**—An incorporated cemetery association in the business of selling lots for purposes of gain is not exempt from taxation under §4708a Burns 1901, Acts 1895, p. 18. p. 482.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Suit by Albert A. Wells against the Oak Hill Cemetery Company and others. From a decree for plaintiff, said company appeals. *Affirmed.*

John A. Gavit, for appellant.

Thomas J. Wood, for appellee.

ROBINSON, C. J.—Appellee held a tax deed to certain land sold for taxes by the auditor as the property of appellant. The court found the tax deed invalid as to conveying title, but decreed a lien for \$888.02 against the land for taxes paid. The one question is whether the land is subject to taxation, the same being used exclusively for cemetery purposes.

The agreed facts are: Appellant is a corporation organized under the laws of this State for cemetery purposes only. The twenty acres of land described was listed for taxation and sold by the county treasurer to appellee in

February, 1901, for the taxes for 1899 and 1900, amounting to \$305.32. A deed was issued to appellee by the auditor in February, 1903. Since the sale appellee has paid on the land \$237.31 taxes for 1902 and 1903. In July, 1899, the county board of review by a resolution ordered that cemeteries be not taxed. Appellant was organized for the purpose of selling lots for gain and profit for burial purposes, and at the time of levying the taxes and the sale appellant had personal property from which the taxes could have been made. It was further agreed that the only question to be determined is whether the land is subject to taxation, the same being used exclusively for cemetery purposes.

By the law approved March 6, 1891 (Acts 1891, p. 199, §5), one of the provisions exempting certain property from taxation was the following: "Every building used for religious worship and the pews and furniture within the same, and also the parsonage attached thereto and occupied as such, and the land whereon such building or buildings are situate, not exceeding ten acres, when owned by a church or religious society, or in trust for its use, also every cemetery." By an act approved January 31, 1893 (Acts 1893, p. 12, §8412 Burns 1901), the above provision was amended by substituting the word "belonging" for "attached." By an act approved February 20, 1895, under the title, "An act exempting from taxation the property of cemeteries organized under the laws of this State, upon a basis which prevents the corporation from deriving therefrom pecuniary benefit or profit," it is provided: "That in all cases where cemeteries have been incorporated under the laws of this State upon such a basis, that the corporation cannot derive any pecuniary benefit or profit therefrom, all the property and assets belonging to such corporation used exclusively for cemetery purposes, shall be exempt from taxation for any purpose." (Acts 1895, p. 18, §4708a

Burns 1901.) The act of 1895, *supra*, was in force at the time of the levy of the taxes and sale here in question, although it has since been superseded by the act in force April 15, 1905 (Acts 1905, p. 185, §4708a Burns 1905).

The legislature is directed by §1, article 10, of the Constitution to provide by law for a uniform and equal rate of assessment and taxation, and to prescribe such

1. regulations as shall secure a just valuation for taxation of all real and personal property, excepting such only "for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law." The legislature is without authority to exempt any property from taxation unless it comes within one of the classes above mentioned. *State, ex rel., v. City of Indianapolis* (1879), 69 Ind. 375, 35 Am. Rep. 223, and cases cited; *Warner v. Curran* (1881), 75 Ind. 309; *Deniston v. Terry* (1895), 141 Ind. 677; *Harn v. Woodward* (1898), 151 Ind. 132; *Travelers Ins. Co. v. Kent* (1898), 151 Ind. 349.

Whether land set apart and in fact used as a cemetery or burial ground is used for religious purposes, or, as counsel argues, for charitable purposes, within the

2. meaning of the Constitution, it is unnecessary to stop and inquire. When the men who framed the Constitution came to consider the character and purpose of the property that might be exempted from taxation, they, in common with the rest of mankind, did not think of the family burying-ground and the churchyard as property. They not only thought that they should not be taxed, but, following the natural impulses of the race, they did not think it necessary even to say in words that they should be exempt from taxation. If a particular plot of ground is and has been used for burial purposes it is exempt from taxation within the spirit and intent of the above constitutional provision. See *Dwenger v. Geary* (1888), 113 Ind.

106, 112; *Page v. Symonds* (1883), 63 N. H. 17, 56 Am. Rep. 481; *Craig v. First Presbyterian Church* (1878), 88 Pa. St. 42, 32 Am. Rep. 417.

As appellant is relying upon the exemption of its property from taxation, the burden was upon it to show

3. that its property came within some class of property which the statute says is exempt. A tract of land purchased by an incorporated cemetery association for cemetery purposes and platted into lots for

4. cemetery purposes could properly be said to be used exclusively for cemetery purposes. But this is not equivalent to saying that the lots are used for burial purposes, and that they are now in use for such purposes. But the facts show that appellant was organized for the purpose of selling lots for gain and profit for burial purposes. Whether a part or any of such lots have been sold and are now used by the purchasers for burial purposes does not appear. The exemption given by the acts of 1891 and 1893, *supra*, were not intended to relieve from taxation any property that was used by the owner for purposes of gain and profit, and to make this perfectly clear the legislature passed the act of 1895, *supra*. This act is superseded by the act of 1905, *supra*, which makes the further provision that such association may set aside a definite portion of the proceeds derived from the sale of lots as a perpetual care fund, which fund shall be exempt from taxation.

Upon the facts, the case comes within the provisions of the act of 1895, which does not exempt cemetery property where the corporation is organized for the purpose of selling lots for gain and profit, and the land not in actual use for burial purposes.

Judgment affirmed.

THE STATE v. DAWSON.

[No. 6,022. Filed June 28, 1906.]

1. **INDICTMENT AND INFORMATION.—Canada Thistles.—Permitting to Grow.—Statutes.**—An affidavit charging that defendant did “knowingly and unlawfully allow Canada thistles to grow and mature, and become of length of more than 6 inches upon his land” states a criminal offense under Acts 1905, pp. 584, 738, §627, §2308 Burns 1905, regardless of the giving of notice as prescribed in §627a of said act. p. 483.
2. **SAME.—Sufficient, Connected with Insufficient, Charge.**—Where an affidavit charges one crime sufficiently, but insufficiently charges another, the affidavit is sufficient, the insufficient charge being treated as surplusage. p. 485.
3. **SAME.—Charging Conjunctively.**—Where the statute makes it a crime to do any one of a number of things mentioned disjunctively, the penalty for all being the same, they may all be charged conjunctively in a single count. p. 485.
4. **SAME.—Second Offense.—Presumptions.**—Where an affidavit fails to show that the crime charged is a second offense, it will be presumed to be a first offense. p. 486.

From Laporte Circuit Court; *John C. Richter*, Judge.

Prosecution by the State of Indiana against George Dawson. From a judgment quashing the affidavit, the State appeals. *Reversed.*

Charles W. Miller, Attorney-General, and *F. R. Liddell*, for the State.

M. R. Sutherland and *R. N. Smith*, for appellee.

BLACK, J.—The court upon motion of the appellee quashed the affidavit in a prosecution commenced before a justice of the peace. The affidavit charged that “on

1. July 27, 1905, and for many days prior thereto, one

George Dawson did then and there, knowingly and unlawfully allow Canada thistles to grow and mature, and become of length of more than six inches, upon his land, to wit: [describing the land] which land was at said times occupied by him, contrary,” etc.

The statute (§2308 Burns 1905, Acts 1905, pp. 584, 738, §627) provides: "Any person who shall knowingly allow Canada thistle or thistles to grow and mature, or shall allow any Canada thistle or thistles to grow until they or any of them become of the length of six inches, measuring from the surface of the soil to the end or tip of the stem above the surface of the ground, upon his, her or their land, or upon any land which they shall occupy or have under their charge and control, * * * shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined, for the first offense, in any sum not more than \$1, and for each subsequent offense in any sum not more than \$10."

In the next section (§2309 Burns 1905) it is provided: "If any resident in any township of this State shall make complaint to any road supervisor in the township in which such resident may live that any owner or occupant of land (as described in §627 of this act), in said road supervisor's district, is allowing Canada thistle to grow (as defined in §627 of this act), it shall be the duty of said road supervisor to notify said owner or occupant of said land to within five days cut the said thistles off below the surface of the ground. Any owner or occupant of land, after having been notified as aforesaid, who shall fail to perform the duties required of him by the preceding section and by §627a of this act, shall be guilty of the offense described in §627 of this act and liable to the penalties provided therefor."

It is contended on behalf of the appellee that before a person can be liable to the punishment prescribed he must first have had the five days' notice from the road supervisor, as provided in §2309, *supra*, and must have failed to comply with such notice. We cannot accept such a construction of the statute. In the portion of §2308, *supra*, quoted above, different offenses are described, for each of which the same punishment is provided: (1) When any person shall know-

ingly allow Canada thistle or thistles to grow and mature upon his, her or their land, or (2) upon any land which they shall occupy, or (3) have under their charge and control, or (4) when any person shall allow any Canada thistle or thistles to grow until they or any of them become of the length of six inches, measuring from the surface of the soil to the end or tip of the stem above the surface of the ground upon his, her or their land, or (5) upon any land which they shall occupy, or (6) have in their charge or control. Any person who shall thus do any of these things must be deemed guilty of a misdemeanor; and the offense is by the terms of §2308, *supra*, made complete without any reference to notice from any officer. Upon the occurrence of the facts stated in §2309, *supra*, the owner or occupant of land notified, if guilty of any offense, would be rendered so upon facts described in that section. The affidavit stated an offense completely when it charged the appellee with knowingly and unlawfully allowing Canada thistles to grow and mature upon his land described.

If one offense be sufficiently charged in an indictment or affidavit, the pleading will not be rendered bad by the fact that an additional offense is insufficiently

2. charged; the latter charge should be treated as surplusage. *Eagan v. State* (1876), 53 Ind. 162; *Hatfield v. State* (1894), 9 Ind. App. 296.

When a statute makes it a crime to do any one of a number of things mentioned disjunctively, all of which are punishable alike, any or all of them may be charged

3. conjunctively in a single count. *Marshall v. State* (1890), 123 Ind. 128; *Rhodes v. State* (1891), 128 Ind. 189, 25 Am. St. 429; *Hauk v. State* (1897), 148 Ind. 238; *Hobbs v. State* (1893), 133 Ind. 404, 18 L. R. A. 774; *State v. Sarlls* (1893), 135 Ind. 195; *State v. Stout* (1887), 112 Ind. 245; *Mergentheim v. State* (1886), 107 Ind. 567; *Fahnestock v. State* (1885), 102 Ind. 156; *Davis v. State* (1885), 100 Ind. 154; *Crawford*

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v. *State* (1870), 33 Ind. 304; *State v. Alsop* (1853), 4 Ind. 141.

It was not necessary to the sufficiency of the affidavit to state therein that the crime charged was a first or second or other subsequent offense. In the absence of an al-

4. legation concerning such matter, the crime charged would be assumed to be a first offense. 1 Bishop, *Crim. Law* (8th ed.), §959 *et seq.*; *Kilbourn v. State* (1833), 9 Conn. 560; *People v. Cook* (1887), 45 Hun 34. See, also, *Good v. State* (1878), 61 Ind. 69.

Judgment reversed, with an instruction to overrule the appellee's motion to quash.

BRUGH ET AL. v. DENMAN.

[No. 6,053. Filed June 28, 1906.]

1. **LIFE ESTATES.—*Growing Timber.—Rights of Life Tenant.***—A life tenant in lands has the right to use the growing timber thereon for use upon the land in making repairs generally. p. 488.
2. **SAME.—*Waste.***—If the life tenant uses more timber than necessary for making repairs he is guilty of waste, for which a proper action will lie. p. 488.
3. **WORDS AND PHRASES.—“*Waste.*”—“*Waste,*”** at the common law, was the destruction of real property, by a person in possession not having the inheritance, to the injury of the immediate remainder or reversion in fee. p. 488.
4. **INJUNCTION.—*Life Estate.—Growing Timber.***—Injunction lies on behalf of the life tenant to prevent the reversioner from cutting and removing from the land timber which is necessary for repairs. p. 488.
5. **SAME.—*Irreparable Injury.***—Great, as well as irreparable injury will sustain an injunction for a threatened trespass. p. 489.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Suit by Tabitha Denman against Emma A. Brugh and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

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Adam E. Wise and L. M. Lauer, for appellants.

Martindale & Stevens, for appellee.

ROBINSON, C. J.—The questions presented by this appeal are the relative rights of a life tenant and the owner of the fee of the same land in respect to growing timber.

The court found substantially the following facts: Appellee by the last will of her husband was given a life estate in 180 acres of land all in one body and constituting one farm, which was the home of the husband and appellee at the time of his death and since his death appellee has been in possession. By the will appellant Brugh, a daughter, became the owner in fee of forty acres of the land. This tract of forty acres is inclosed, with a cross-fence dividing it, and a tract of about twelve acres is timber, consisting principally of oak, ash, maple and bass wood. Prior to December 12, 1904, appellant Brugh sold the saw timber on the land, for prices named, and intended to cut and remove enough to pay a debt of \$225 owing to appellee, and declared her intention to sell all the declining saw timber and enough timber to pay the above note, but was notified by appellee not to cut any of the timber; but on the above date appellant Brugh, by her agents, cut seven growing trees into logs. At the time suit was brought the fences were in need of repair, appellee having permitted them to become out of repair. The saw timber was worth from \$325 to \$350, and there was enough other timber to make 250 to 300 fence posts. Of the forty-seven trees of saw timber about half were "on the decline." The "declining timber" and the greater part of all the timber will be needed in making repairs during the life estate, and if appellants carry out their intention and remove the timber there will not be sufficient timber left to make needed repairs. Removing the timber will lessen the value of appellee's interest and work to her a permanent injury.

At common law the life tenant, as a compensation for the duty of keeping the premises in repair, had the right to cut

timber for use upon the land, for the repair of

1. buildings, for fuel, for house-bote, and for the erection and maintenance of hedges and fences. If the tenant exceeded the amount necessary for these purposes he was deemed guilty of waste and liable to the reversioner for damages. 2 Blackstone's Comm., *35; 1 Washburn, Real Prop. (4th ed.), 128; Coke's Littleton, 41b. If the waste was already committed the tenant was liable to an action at law for damages, and by statute in England treble damages might be awarded and the land wasted forfeited to the reversioner. If the waste was only threatened the equitable remedy by injunction was given, and this remedy would be given in any case where irreparable injury was feared. 1 Washburn, Real Prop. (4th ed.), 155, 156; Tiedeman, Real Prop. (2d ed.), §81.
- 2.

But waste is defined to be "a spoil or destruction, not arising from an act of God, or of a public enemy, in houses, gardens, trees, lands, or other corporeal heredita-

3. ments, to the disherison of him who has the immediate remainder or reversion in fee simple, or in England in fee tail. The three general heads of waste, therefore, are in houses, in timber and in lands; although, whatever else tends to the destruction or to the depreciation of the value of the inheritance is likewise waste." 2 Minor's Inst. (3d ed.), 598. See 2 Blackstone's Comm., *281. So that at common law waste could be committed only by a person in possession and not having the inheritance, the absolute owner being incapable of committing waste.

However, appellee is in possession of the land as life tenant. The act of appellant Brugh in going upon the land for the purpose of cutting the timber was a trespass.

4. The court found as a fact that practically all the timber would be needed in making repairs on the premises. It is true appellee had permitted the fences to become out of repair, but the appellant Brugh was not

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endeavoring to use any of the timber for making repairs. If the timber is needed to make repairs appellee as life tenant is entitled to it for that purpose. It is found as a fact that removing the timber would lessen the value of her interest and would work a permanent injury.

It is not necessary that irreparable injury should be threatened before equity will grant relief by injunction.

That the party will suffer great injury is enough.

5. In 4 Pomeroy, Eq. Jurisp. (3d ed.), §1357, it is said: "A remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which the jury may assess." See *Watson v. Sutherland* (1866), 5 Wall. 74, 18 L. Ed. 580; *Hart v. Hildebrandt* (1903), 30 Ind. App. 415; *Thatcher v. Humble* (1879), 67 Ind. 444; *Chappell v. Jasper County, etc., Gas Co.* (1903), 31 Ind. App. 170; *Champ v. Kendrick* (1892), 130 Ind. 549; *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Bishop v. Moorman* (1884), 98 Ind. 1, 49 Am. Rep. 731.

As the cutting of the timber was wrongful we fail to see how appellant Brugh can be permitted to take advantage of her own wrong and claim the timber that she had cut before the suit was brought. What disposition, as between the life tenant and the reversioner, should be made of timber that is deteriorating in quality and value, but not needed to make repairs, is not presented by this appeal, as the court finds that practically all the timber will be needed by the life tenant in making repairs.

Judgment affirmed.

GAAR, SCOTT & CO. v. FLESHMAN.

[No. 5,389. Filed April 25, 1906. Rehearing denied June 28, 1906.]

1. *SALES.—Contracts.—Delivery by Vendor.—Refusal to Accept by Vendee.—Recovery.*—Where the vendor executes his contract by tendering the property sold and the vendee refuses to accept or pay for the same, the vendor may hold such property for such vendee and recover the contract price. p. 491.
2. *SAME.—Delivery.—Title.—Vesting.—Purchase Money.—Recovery.*—Before the vendor can recover the contract price of an article sold, he must have delivered such property or must have done such things as vest the title thereto in the vendee. p. 492.
3. *SAME.—Contracts.—Title Retained by Vendor.—Measure of Damages for Breach.*—Where the vendor retains title to the goods contracted to be sold, the measure of damages for the vendee's breach of contract is the actual injury such vendor sustains. p. 492.
4. *SAME.—Title to Remain in Vendor.—Right of Vendor to Treat Sale as Absolute.—Election.—Action for Contract Price.—Effect.*—Where a vendor in his contract of sale provides that "the title to said goods shall not pass until settlement is concluded and accepted" by such vendor, and the goods are shipped and tendered as provided for in the contract, and the vendee refuses to accept, an action by such vendor for the contract price is an election to treat the sale as absolute, and the absolute title immediately vests in the vendee. pp. 493, 494.

From Harrison Circuit Court; C. W. Cook, Judge.

Action by Gaar, Scott & Co. against Andrew J. Fleshman. From a judgment for defendant, plaintiff appeals. *Reversed.*

Murat W. Hopkins, Russell T. MacFall and Thomas J. Wilson, for appellant.

William Ridley, for appellee.

ROBY, C. J.—A demurrer for want of facts was sustained to appellant's amended complaint. It refused to plead further and appeals from the judgment thereupon

rendered. The action is founded upon an instrument in writing, by which appellee ordered from appellant a certain machine, agreeing to receive the same, subject to the conditions of a printed warranty, to pay freight and charges from Richmond, Indiana, and to pay, by note, at the time and place of delivery, \$463. It also contained stipulations as follows:

“Machinery to be loaded on cars at Richmond, Indiana, on or about May 1, 1903, and shipped to A. J. Fleshman, consignee, at Corydon, Indiana station, County of Harrison, State of Indiana. * * *

7. The title to said goods shall not pass until settlement is concluded, and accepted by Gaar, Scott & Co.

* * * This order is not subject to countermand.”

It is averred in detail that appellant complied with the terms of said agreement upon its part in all things, but that appellee refused to receive said machine on its arrival at Corydon, refused to execute his note and mortgage in payment therefor, as provided in the contract, or to pay freight and charges; that appellant thereupon tendered said machine to him, demanded that he pay for the same in the manner specified by the contract, but that appellee refused and refuses to do so; that appellant immediately thereafter stored said machine as appellee's property, has ever since and now holds it in storage as his property, and notified him thereof; that appellee is indebted to appellant in the sum of \$463, and the further sum of \$30 freight paid by it, which sums are due and unpaid.

Appellant's proposition for reversal is that when the vendor has executed a contract by delivery or tender of the chattel sold, and the purchaser has refused to exe-

1. cute the contract by acceptance and payment, the vendor may hold the chattel for the purchaser and recover the contract price. *Gardner v. Caylor* (1900), 24 Ind. App. 521; *Rastetter v. Reynolds* (1903), 160 Ind. 133; *Dill v. Mumford* (1898), 19 Ind. App. 609. This

proposition is not controverted but its applicability is denied. The exception claimed is based upon the clause of the contract by which it is stipulated that title shall not pass until settlement is concluded and accepted.

It is established in this State that "in all cases of contracts for the sale of personal property, when it has any market value, the vendor, before he can recover from

2. the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property and also recover the price of it." *Pittsburgh, etc., R. Co. v. Heck* (1875), 50 Ind. 303, 19 Am. Rep. 713. And see *Indianapolis, etc., R. Co. v. Maguire* (1878), 62 Ind. 140, 147; *Dwiggins v. Clark* (1884), 94 Ind. 49, 52, 48 Am. Rep. 140; *Dill v. Mumford, supra*; *Ridgley v. Mooney* (1896), 16 Ind. App. 362; *Browning v. Simons* (1897), 17 Ind. App. 45; *Gardner v. Caylor, supra*.

By the stipulation in the contract, title to the goods contracted for remained in appellant until settlement was concluded and accepted by it. So that unless such

3. stipulation has been waived the measure of damages will be the actual injury sustained by appellant on account of appellee's breach of contract. *Fell v. Muller* (1881), 78 Ind. 507, 513; *Gardner v. Caylor, supra*; *Shippo v. Atkinson* (1894), 8 Ind. App. 505; *Dill v. Mumford, supra*; *Ridgley v. Mooney, supra*. There is in the decisions of other courts than our own a diversity of opinion as to the vendor's right to recover the contract price when, by the contract, title remains in him until payment. 24 Am. and Eng. Ency. Law (2d ed.), 1115, 1118, 1149, 1150.

The contract is one for the sale of goods. For its breach the vendee is liable, but he is not liable to pay the full pur-

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chase price, unless title has been transferred. In

4. *Colles v. Lake Cities Electric R. Co.* (1899), 22

Ind. App. 86, this court said: "The property was to remain in the seller and therefore there was to be no complete absolute sale until the acceptance and payment." In that case the option of accepting the property and thereby transferring title was in the vendee, but the effect of the nontransfer of title upon the right to recover the contract price is not different than in the case at bar. In that case the vendee had it in his power to prevent the transfer of title. In this case the vendor alone determines whether he will retain title in default of settlement. "He might hold it or yield it as he chose." *Smith v. Barber* (1899), 153 Ind. 322. Upon default of payment the vendor had the right to treat the sale as absolute, and bring an action for the contract price. Such action evidences his election to treat the sale as absolute. *Turk v. Carnahan* (1900), 25 Ind. App. 125, 81 Am. St. 85; *Smith v. Barber, supra*; 24 Am. and Eng. Ency. Law (2d ed.), 1136.

If appellee's contention, that retaining title by the vendor prevents the maintenance of an action for the contract price, were conceded, it would as effectually bar a suit brought after actual possession of the machine had been taken as it would one under the circumstances here disclosed. In either case an election to sue for the purchase price operates to vest the complete title in the purchaser. It has sometimes been attempted to sustain the right of a vendor to recover the contract price, upon the theory that "if a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so and thereby binding himself to pay the whole sum." *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; *Register Co. v. Hill* (1904), 136 N. C. 272, 48 S. E. 637. The trouble with this is that the contract is not one for the payment of a definite sum of money upon the happening of a certain

event, or at a stated time; but it is a contract for the sale of personal property, the measure of damages for the breach of which is fixed by law as above stated. Three members of the court dissented in *White v. Solomon, supra*, and the dissenting opinion of the chief justice expresses both the better reason and the better law.

The writer believes that the opinion in *Kilmer v. Money-weight Scale Co.* (1905), 36 Ind. App. 568, should be modified, but the majority of the court do not think there is any conflict.

Judgment reversed, and cause remanded, with instructions to overrule the demurrer to the complaint, and for further consistent proceedings.

Black, P. J., Myers, Robinson and Wiley, JJ., concur; Comstock, J., not participating.

ON PETITION FOR REHEARING.

- ROBY, J.—The contract providing for the retention of title by the vendor is for his benefit and manifestly to compel settlement by the vendee.

If the vendor had no power to waive such provision, he could in no instance recover the full contract price in an action brought before such settlement was concluded. This would be equally true, whether the goods were held by the vendee in person or held for him by the vendor. Acceptance of the goods by the vendee does not destroy the condition or render it inoperative. The delivery of the property at the depot by appellant was, so far as it is concerned, as full a delivery as though appellee had driven to the factory and hauled the machine home. Sued for the contract price, appellee could as well answer in one case as the other, that by the terms of the contract the title remained in the vendor. Such suit in this State evidences an election to treat the sale as absolute. Had appellee taken bodily possession of the machinery and refused to make settlement, appellant might have elected to retake and keep

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it. Appellee refusing to receive it, the appellant, having done what lay in its power to make delivery, might have retained possession for itself. It chose, however, as it might do in either case, to sue for the purchase price, and therefore continues to hold the property for appellee.

In the case of *Colles v. Lake Cities Electric R. Co.* (1899), 22 Ind. App. 86, the conditions were exactly reversed. The law by which the facts relative to delivery must be measured is a part of the contract, and in measuring the rights of the parties by law, the court puts nothing into the contract other than what the parties themselves include. Facts involved in the authorities heretofore cited, so far as they differ from those presented in the case at bar, may be eliminated, without changing the reason or applicability of the rules declared.

In view of its importance and the novelty of the questions argued, this case has received very careful consideration, and the able brief in support of the petition for a rehearing does not persuade us that the conclusion heretofore announced was incorrect. The petition is therefore overruled.

**HARRAH ET AL. v. STATE, EX REL. DYER,
ADMINISTRATOR.**

[No. 5,301. Filed December 12, 1905. Rehearing denied April 25, 1906. Transfer denied June 28, 1906.]

1. **PARTNERSHIP.**—*Surviving Partners.*—*Settlement.*—*Statutes.*—*Equity.*—While the probate courts in the settlement of estates and in proceedings for the settlement of partnerships by the surviving partners apply equitable doctrines, still, the procedure is statutory. §§8122-8129 Burns 1901, §§6046-6053 R. S. 1881. p. 501.
2. **SAME.**—*Surviving Partners.*—*Failure to do Duty.*—*Receivers.*—Under §§8126, 8127 Burns 1901, §§6050, 6051 R. S. 1881, where the surviving partner fails properly to discharge the duties of his trust a receiver may be appointed on behalf of any person interested. p. 502.

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3. **PARTNERSHIP.**—*Surviving Partners.*—*Settlements.*—The surviving partner stands in the same relation to the partnership property as the administrator or trustee to his trust estate, being governed by similar statutory provisions. p. 502.
4. **SAME.**—*Surviving Partners.*—*Bonds.*—*Administrator of Deceased Partner's Estate Proper Relator.*—The administrator of the deceased partner's estate is a proper relator in an action on the surviving partner's bond, but the assets recovered cannot be distributed to such estate until the partnership's debts are all paid. p. 502.
5. **SAME.**—*Surviving Partners.*—*Bonds.*—*Action on.*—*Exclusion of Probate Court.*—The circuit court in an action on the bond of a surviving partner cannot exclude the probate court from jurisdiction in the settlement of the partnership. p. 503.
6. **SAME.**—*Surviving Partners.*—*Bonds.*—*Actions on.*—*Final Settlement.*—*Setting Aside.*—An action will not lie on the bond of a surviving partner until his final settlement is set aside, if one has been made. p. 503.
7. **SAME.**—*Surviving Partners.*—*Current Reports.*—*Collateral Attack.*—*Evidence.*—Current reports of a surviving partner are not *res judicata* but are not subject to a collateral attack, and upon exceptions to a final report are only *prima facie* evidence of the truth of their contents. p. 503.
8. **PLEADING.**—*Complaint.*—*Bonds.*—*Surviving Partners.*—A complaint on a surviving partner's bond alleging that such partner failed and refused to discharge his duties, setting out such failures, is sufficient as against a general demurrer, one well-assigned breach being sufficient. p. 503.
9. **APPEAL AND ERROR.**—*Master Commissioner's Report.*—*Whether Part of Record without Bill of Exceptions.*—*Statutes.*—The report of the evidence and his findings by a master commissioner are a part of the record on appeal without any bill of exceptions, by virtue of Acts 1903, p. 338, §3, §641c Burns 1905; and the fact that the report was not all filed at the same time makes no difference. pp. 504, 507.
10. **TRIAL.**—*Surviving Partners.*—*Current Reports.*—*Fraud.*—In an action on the bond of a surviving partner where the facts found fail to show that current reports of such partner were not fraudulent, such reports must be taken as valid. p. 505.
11. **APPEAL AND ERROR.**—*Exceptions to Master Commissioner's Special Findings.*—*Request.*—Where a special finding was not required from a master commissioner, exceptions to his alleged special findings present no question. p. 506.
12. **SAME.**—*Evidence.*—*Whether All in Record.*—*Necessity for.*—Where the decision of a case must, under the issues, turn upon

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an indisputable fact, whether other evidence on other questions is all in the record, is immaterial. p. 506.

13. **NEW TRIAL.**—*Decision Contrary to Law.*—*Evidence.*—*Fraud.*—A decision treating orders of a court having jurisdiction of the persons and subject-matter as a nullity is contrary to law, where there was no allegation nor proof of fraud. p. 506.
14. **JUDGES.**—*Duties.*—*Courts.*—*Surviving Partners.*—*Settlements.*—It is the duty of the judge of the court to which a surviving partner must report to exercise rigid inspection over such partner's doings and compel a speedy administration of the assets of such partnership. p. 506.

From Sullivan Circuit Court; *Orion B. Harris*, Judge.

Action by the State of Indiana, on the relation of Mattie W. Fellows as administratrix of the estate of Frank A. Fellows, deceased (Fred E. Dyer being substituted as administrator), against William B. Harrah and others. From a judgment for plaintiff, defendants appeal. *Reversed.*

Cyrus E. Davis, John S. Bays, W. L. Rude and Fred F. Bays, for appellants.

Henry W. Moore and Louis B. Ewbank, for appellee.

ROBY, C. J.—This action was commenced in the Greene Circuit Court. Upon motion of the appellant Harrah the venue was changed to the Sullivan Circuit Court, where such proceedings were had as resulted in a judgment for the plaintiff.

The single paragraph of amended complaint is founded upon a bond, executed by appellant Harrah as principal and by his coappellants as sureties. A demurrer to the complaint was overruled, and an answer in two paragraphs filed—the first a general denial, and the second setting up affirmative facts. A demurrer was filed to this paragraph of answer, but no ruling thereon was made. The cause was referred to a commissioner, who heard the evidence and reported the same, together with his conclusions of fact, which were approved and adopted by the court, and finding and judgment rendered accordingly, appellants' excep-

tions to the report being overruled, as were separate motions for a new trial and to modify the judgment.

Facts averred in the complaint and not disputed at the trial are that the relatrix was the duly appointed and acting administratrix of Frank A. Fellows, who was at his death a member of a partnership, composed of himself and appellant Harrah, engaged in the sale of hardware at Worthington, Greene county, the business being a profitable one and the firm having on hand a large and valuable stock of merchandise. Harrah, within sixty days after the death of his copartner, filed, in the clerk's office of Greene county, an inventory and appraisalment of the assets of said firm, together with a statement of its liabilities, and also executed and filed the bond in suit, the conditions of which were as follows:

"The condition of the above obligation is, that the above-bound William B. Harrah has taken upon himself the duties to settle according to law, as the surviving partner thereof, the partnership of the late firm of Harrah & Fellows, composed of William B. Harrah, surviving partner, and Frank A. Fellows, deceased; now if said William B. Harrah shall faithfully discharge the duties of his trust therein according to law, then the above obligation is to be void, else to remain in full force."

He thereupon took upon himself the administration of said business according to law.

Ten breaches of the bond in suit are specifically assigned. They are in substance: (1) That after entering upon the settlement of said partnership, Harrah continued the business, buying and selling goods in the usual course of trade at an expense and loss of \$5,000, all of which was done unlawfully, with the fraudulent intent to speculate and make money for himself out of the assets of said partnership. (2) That after advertising the stock for sale, he hindered and prevented a profitable sale thereof by saying to probable bidders that the purchaser would have to move

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out of the building; that no one could afford to give more than fifty cents on the dollar, and by refusing to give information concerning said stock, with the fraudulent intent of purchasing it himself. (3) That, with the same fraudulent intent, he refused to offer the good-will of said business for sale. (4) That, with the fraudulent intent to speculate and make money for himself, he restocked said business after the death of his partner. (5) That, with the same fraudulent intent, he sold said stock for \$5,000, less than it was worth, whereby the relatrix was compelled to and did employ attorneys and contract attorneys' fees of \$250, in order to set aside said fraudulent sale. (6) That he included in the final sale of said stock, horses and other personal property, not connected with the business or included in the petition to sell. (7) That while pretending to settle the business he borrowed money and paid interest out of the assets, it not being necessary to do so. (8) That he has failed and refused to collect the notes and accounts due said estate. (9) That he has failed to close up said partnership as speedily as practicable, but has fraudulently delayed the same, to the injury of the estate of said deceased partner. (10) That he refuses to close up said partnership business, although often demanded, and although possessed of sufficient funds. (11) That he has collected rents and profits of partnership real estate and wrongfully withheld the same from the relatrix.

The affirmative paragraph of answer above referred to contains a recital of the facts relative to the undertaking to settle the partnership as above stated, and sets up further proceedings therein to the effect that, after duly qualifying, Harrah made application to the Greene Circuit Court for an order to postpone the sale of said stock, which was duly granted, and said sale was postponed until May 4, 1903. On March 11 he applied to said court for an order to replenish said stock from time to time during the period until

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sale, as aforesaid, said purchases not to exceed \$1,500 at any one time, and not to exceed \$2,000 in all, which order was duly granted, and remained in force until the sale of the stock, on May 25, 1903. On March 14, 1903, he procured an order to sell said stock, and to advertise the same, and to seek bidders, and did all things required of him. The property was sold and duly reported. The sale was not approved by the court. The property was resold on May 25, which sale was duly confirmed and approved by said court, its judgment to that effect being still in full force. The settlement of said estate is now pending in said court, and the final report has been filed in said court. Denials of various averments of the complaint are incorporated in this answer.

It is disclosed by the complaint that the surviving partner complied with the statute and undertook to make settlement in accordance therewith. The relatrix, so far from objecting to this action, expressly ratifies it by bringing her suit to recover on the bond therein given. The judgment appealed from is as follows: "It is therefore considered, ordered, adjudged and decreed by the court that the plaintiff recover of and from the defendants herein the sum of \$3,207.22, together with her costs and charges in this behalf laid out and expended, taxed at \$——, and that said defendants pay, as part of the costs of this action, the sum of \$100, master commissioner's fees and costs, which is hereby allowed and ordered taxed as costs against defendants. It is further considered, adjudged and decreed by the court that the defendant William B. Harrah be required, and he is hereby ordered, to proceed at once to settle and close up said partnership business, and out of the partnership funds in his hands pay and fully discharge the mortgage on the partnership real estate, which mortgage was executed by said partners to the Providence Life & Trust Company for the principal sum of \$3,000; and

also to pay and fully discharge out of the partnership funds in his hands all other debts and liabilities so as to leave said partnership real estate free from any debt or liability of said partnership. It is further ordered, adjudged and decreed by the court that said partnership funds now in the hands of said William B. Harrah and the property of said William B. Harrah, including his interest in said real estate owned and held by said partners jointly, and also the property of Carpus N. Shaw and William B. Squire, be first exhausted in the payment of this judgment, and any and all other debts and liabilities of the partnership, before resorting to the interest of the plaintiff's relatrix in the partnership real estate, so that the interest which said deceased partner had in said real estate may be left to his estate free from any encumbrance, and free from any debt or liability of said partnership."

Proceedings in the settlement of partnerships by the surviving partner are governed in this State by statute.

Acts 1877, p. 136, §§8122-8129 Burns 1901.

1. Equity jurisdiction embraces the administration of estates, but in the United States such administration is had in accordance with specific statutes. The statutory rules are largely based upon principles declared in equity, the doctrines of which are constantly enforced by probate courts, but this head of equity jurisdiction has been practically abandoned in all the states. The foregoing statement adapted from 2 Pomeroy, Eq. Jurisp. (2d ed.), §77, is equally applicable to the settlement of the affairs of a partnership dissolved by the death of one partner. The principles embodied in the statute are, generally speaking, those which, in the absence of a statute, would be applied in equity; but such settlements must be made in accordance with the statutory provisions.

Where the surviving partner neglects to qualify, or qualifying, wastes firm assets, or does not properly settle, any

interested person may procure the appointment of
2. a receiver. §§8126, 8127 Burns 1901, §§6050, 6051 R. S. 1881. The receiver "shall proceed to settle the same as though a voluntary assignment for the benefit of the creditors had been made by the surviving partner."

It is the duty of the surviving partner to make final report to the proper court, and to pay the surplus belonging to the deceased partner into court, to be paid out

3. upon the order of the judge. The partnership business must be settled within two years "unless the court, for good cause shown, shall grant a longer time." §8128 Burns 1901, §6052 R. S. 1881.

"This act * * * gives a supervising control to the court having probate jurisdiction, and appears to be modeled upon the act for the settlement of decedents' estates. The duties and liabilities of the surviving partner * * * are similar to the duties required of administrators, executors and guardians, more analogous in fact than any other class of persons to whom our attention has been called." *State v. Matthews* (1891), 129 Ind. 281, 285.

The analogy between the surviving partner and a trustee appointed under the act providing for voluntary assignments, etc., and the amendments thereto, is also close, while by the appointment of a receiver the letter of that act becomes applicable. Acts 1859, p. 293; §§2899, 2908 Burns 1901, Acts 1891, p. 312, Acts 1897, p. 245.

The jurisdiction of the probate court over the settlement of the affairs of a surviving partnership is as exclusive as over that of a decedent's estate. The relatrix is

4. averred to be the duly appointed administratrix of the estate of the deceased partner; and as such administratrix she is a proper relatrix, but her estate is entitled to no part of the partnership assets until partnership debts have been paid and partnership accounts adjusted. *Valentine v. Wysor* (1890), 123 Ind. 47; *Rogers*

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v. State, ex rel. (1901), 26 Ind. App. 144; *Skillen v. Jones* (1873), 44 Ind. 136.

The bond sued upon is conditioned for the faithful discharge of his duty by the surviving partner. The judgment appealed from seems to have been rendered upon the

5. theory that an action upon the bond conferred jurisdiction upon the court in which it was pending, to administer upon the trust estate to the exclusion of the court "having probate jurisdiction."

The complaint contains nothing relative to the proceedings had in such court. No fraud in making orders or settlements is set up. Indeed the whole matter is

6. ignored. Had the surviving partner made a final report, and the same been approved by the "proper court," such approval would have been an adjudication of the trust and a bar to any action upon the bond. Such action could only be maintained by setting aside such final order for fraud or otherwise. *Carver v. Lewis* (1886), 104 Ind. 438, 442; *Boyd v. Caldwell* (1884), 95 Ind. 392; *Silvers v. Canary* (1888), 114 Ind. 129.

The doctrine of *res judicata* does not apply to interlocutory orders, but such orders are not subject to collateral attack. They protect persons acting upon them, as

7. completely as a final judgment upon the merits would do. Such orders made in the original proceeding herein would be, upon exceptions to the final report, merely *prima facie* correct, but in a suit upon the bond they are conclusive. *State, ex rel., v. Musser* (1892), 4 Ind. App. 407; *State, ex rel., v. Wheeler* (1891), 127 Ind. 451; *Parsons v. Milford* (1879), 67 Ind. 489; *Candy v. Hanmore* (1881), 76 Ind. 125; *Peacocke v. Leffler* (1881), 74 Ind. 327; *Van Fleet*, Collat. Attack, p. 23.

The presumptions are stated in a case involving a decedent's estate, as follows: "It is to be presumed, until the contrary appears, that the administrator of Joseph O'Rear obtained possession of all funds remaining on hand belong-

ing to the estate of Louisa C. O'Rear, and that he will pay them over to the persons entitled; or, if there be doubt or dispute, that he will report them with an account of the doings of his intestate to the proper court in due time. If an unreasonable delay occurs, an application to the court having control of the administrator will be effectual to produce the fund and the account, or a statement of the reasons why they are not forthcoming, when, if the facts justify it, a suit upon the bond of his predecessor will accomplish the whole duty." *Lucas v. Donaldson* (1889), 117 Ind. 139, 142.

It remains to consider the effect of the foregoing legal propositions when taken in connection with the facts herein. The demurrer to the complaint is general,

8. and a single, well-assigned breach requires it to be overruled. *State, ex rel., v. Scott* (1859), 12 Ind. 529. It is not shown by the complaint that the relief prayed is inconsistent with the status of the matter of the surviving partnership. It is shown by averments, that the defendant has failed and refused to discharge his duties according to law, in support of which it would be competent to introduce the record of the original proceeding showing that fact, and there was therefore no error in overruling the demurrer.

A special master commissioner was appointed to hear the evidence in the cause and he was ordered to report the evidence and the facts to the court. In compliance

9. with such order the commissioner duly made his report, including therein a statement of fact as found by him and a longhand report of the evidence taken and heard. Appellee makes the point that neither the finding of facts nor the evidence is before the court, they not having been brought into the record by bills of exceptions. The many cases cited in support of the point were all decided prior to or without considering the act of March, 1903

(Acts 1903, p. 338). Section three of that act (§641c Burns 1905) is as follows: "Every pleading, motion in writing, report, deposition or other paper, filed or offered to be filed, in any cause or proceeding, whether received by the court, refused or stricken out, shall be a part of the record from the time of such filing or offer to file. Any order or action of the court in respect to any such pleading, motion in writing, report, deposition or other paper, and every exception thereto taken by any party shall be entered by the clerk on the minutes or record of the court, and the same when so entered shall be a part of the record without any bill of exceptions. Every oral motion, and the ruling of the court thereon and the exceptions taken thereto, shall be entered upon the record or minutes of the court and shall be a part of the record without any bill of exceptions." The facts and evidence reported by the commissioner are, therefore, a part of the record and before this court, as is made certain by the bodily presence of a record bound in three volumes, the accuracy of which is in no way disputed.

The appellee introduced in evidence, and the commissioner, in the finding of facts has set out, the proceedings had in the matter of said surviving partnership,

10. from which it appears that appellant Harrah procured orders directing his action in most matters wherein it is now challenged, and reported his proceedings therein to said court, by which they were approved. The facts are found, and no evidence has been indicated, from which it can be said that the proceedings of said court were procured by fraud or were otherwise invalid, neither is there any allegation of such fraud or of other facts which render such proceedings ineffective as against a collateral attack, and they must therefore be taken as valid.

There was no request for a special finding of facts. The report of the commissioner cannot be treated as a special

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finding, and the exceptions to it are therefore of

11. no avail. *Terre Haute, etc., R. Co. v. State, ex rel.* (1902), 159 Ind. 438.

The case was submitted for trial to the judge, the finding of the commissioner and his report of the evidence were “approved” and “adopted” by the court, and the

12. judgment appealed from is affirmatively shown to be based upon the consideration and examination of the evidence and facts so reported. It sufficiently appears that all the evidence given in the case was reported and is in the record. The character of the fact upon which the decision depends is not one which could be disputed under the issues. Proof thereof was made by the appellee without objection, so that if other evidence touching other questions had been heard and was not in the record, such fact would be immaterial. *Indiana Clay Co. v. Baltimore, etc., R. Co.* (1903), 31 Ind. App. 258; *American Fire Ins. Co. v. Sisk* (1894), 9 Ind. App. 305; *Shorb v. Kinzie* (1881), 80 Ind. 500; *Johnson v. Wiley* (1881), 74 Ind. 233.

Among other grounds for a new trial set up in the motion therefor are the statutory ones that the decision is contrary to law and not supported by evidence. A

13. decision which treats the orders and proceedings of a court having jurisdiction of the subject-matter and parties as a nullity is contrary to law. *Soules v. Robinson* (1902), 158 Ind. 97. A decision by which such prior proceeding is treated as of noneffect in the absence of allegation and proof rendering it ineffectual as against a collateral attack, is not sustained by sufficient evidence.

These considerations lead to a reversal of the judgment. It is evident that the relatrix was not without provocation, and that the conduct of the surviving partner is a

14. proper subject for investigation. There is no class of trusts in which it is so easy for the trustee to imagine himself as the only party in interest as in those of this class, and it therefore devolves upon the judge of the

court to which he must report to hold a firm hand and permit continuance and delays in administration only where necessary to prevent destruction of firm assets. The presumption is that upon a showing the Greene Circuit Court would have ordered Harrah to file his final report, when by exceptions his liability, if any existed, could have been determined, the bond remaining as a guaranty for the payment of whatever might be due.

Judgment reversed, and cause remanded, with an instruction to sustain the motion for a new trial.

ON PETITION FOR REHEARING.

ROBY, C. J.—It is insisted that evidence can be brought into a record on appeal only by a bill of exceptions. Where evidence taken by a commissioner is embodied in

9. his report, such report being by statute made a part of the record without any bill of exceptions, the evidence therein included is a part of the record as fully as any other portion thereof. Nor does the fact that the entire report was not filed at one time prevent its being considered as an entirety.

The findings made by the commissioner, as well as the evidence upon which they were based, show the pendency of the proceedings for the settlement of the partnership affairs by the surviving partner, and the existence of orders therein made which are not subject to collateral attack and which are not attacked directly.

That no other evidence than that reported and no other facts than those stated by the commissioner were considered by the court, affirmatively appears from its finding and judgment, which are in part as follows: "And the court examines and reviews the evidence and findings of facts as reported by said master commissioner, and, after being fully advised in the premises, overrules said separate objections and exceptions to said report, and the defendants each separately and severally except. Whereupon this cause is

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submitted to the court for trial, finding, judgment and decree, without the intervention of a jury, and the evidence reported by said master commissioner being fully considered, and the court, having examined said report of the evidence and finding of facts, finds for the plaintiff and against the defendants upon the evidence, and that the finding of facts reported by the master commissioner should be approved and adopted by the court as the court finds, to which ruling and finding of the court the defendants each severally and separately except. And said conclusions of fact as embodied in said master commissioner's report are now by the court approved and adopted, and said master commissioner discharged, and the defendants each severally and separately except."

It is not intended to hold that no action can, under any circumstances, be maintained upon the bond executed by a surviving partner, pending the settlement of such trust in the court having jurisdiction thereof, and the language heretofore used is qualified by the facts presented, and has reference only to a case in which orders made by such court are collaterally assailed. Appellee however meets the situation by asserting that the orders made by the Greene Circuit Court in the matter over which it had jurisdiction—of subject-matter, by statute, and of parties, by their own acts are void. With this proposition we cannot agree.

Petition for a rehearing overruled, and the mandate is modified to permit the appellee to amend the complaint if desired.

Myers, Comstock and Robinson, JJ., concur. Black, P. J., concurs in result. Wiley, J., absent.

NEMITZ ET AL. v. STATE, EX REL. MILLER,
ATTORNEY-GENERAL.

[No. 6,196. Filed June 29, 1906.]

1. **APPEAL AND ERROR.**—*Perfecting Appeal.*—*Time.*—*Notice.*—The filing of a transcript and assignment of errors on appeal within one year from the rendition of the judgment, perfects the appeal, as to the appellees, without the service of notice. *Tate v. Hamlin*, 149 Ind. 94, followed. p. 509.
2. **SAME.**—*Briefs.*—*Dismissal of Appeal.*—The filing of a brief, by appellant, of less than one page and complying in no respect with Appellate Court rules, is ground for dismissal of such appeal. p. 511.

From Lake Circuit Court; *H. S. Barr*, Special Judge.

Suit by the State of Indiana, on the relation of Charles W. Miller as Attorney-General, against Frederika Nemitz and others. From a decree for plaintiff, defendants appeal. *Appeal dismissed.*

Thomas J. Wood, for appellants.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *William C. Geake* and *Henry M. Dowling*, for appellee.

ROBINSON, C. J.—Suit by appellee to quiet title. Upon issues formed a decree was entered in appellee's favor, from which appellants appealed. Appellee moves to dismiss the appeal on the ground that it was not perfected within a year from the date of the judgment. Appellants' attorney, on June 16, 1906, acknowledged service of notice that the motion to dismiss would be heard by this court on June 22, 1906, or as soon thereafter as the same could be heard by the court.

This is a vacation appeal. The judgment was entered December 8, 1904. The transcript, with the assignment of errors, was filed in the office of the clerk of this

1. court December 7, 1905. No notices of any kind were issued until about sixty days after the tran-

script was filed, the indorsement on the transcript reciting "1906, February 7. Notice and proof of service to attorney of record and clerk, February 6, 1906." It does not appear from the transcript and its indorsements that any attempt was made to have notice issued or served until in February, 1906.

In *Tate v. Hamlin* (1895), 149 Ind. 94, it is said: "It is also well settled by the decisions of this court that the filing of the transcript with a proper assignment of error thereon within the time limited for taking an appeal perfects the appeal without the service of notice on the appellees." Citing *Harshman v. Armstrong* (1873), 43 Ind. 126; *Johnson v. Stephenson* (1885), 104 Ind. 368; *Wright v. Manns* (1887), 111 Ind. 422.

This case distinguishes the case of *Holloran v. Midland R. Co.* (1891), 129 Ind. 274, on the ground that the notice in the Holloran case was to a coparty and not to an appellee.

In *Bank of Westfield v. Inman* (1892), 133 Ind. 287, the judgment was rendered December 5, 1891, and the transcript with assignment of errors was filed July 16, 1892, on which day a notice was issued, which was served on the 18th day of the month. No notice was issued or served upon the other appellee prior to the filing of the motion to dismiss the appeal, nor was an appearance entered for him. On December 7, 1892, the motion to dismiss was filed, and on the next day the clerk issued a notice to the other appellee; the court said: "If this appeal stood alone upon the transcript and its indorsements, we would be compelled to sustain the motion to dismiss." To the same effect is *Coburn v. Whitaker, etc., Lumber Co.* (1895), 12 Ind. App. 340. See, also, Elliott, App. Proc., §128; *Lawrence v. Wood* (1890), 122 Ind. 452.

While the case of *Tate v. Hamlin*, *supra*, does not expressly overrule the earlier cases, yet it must be conceded

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that it declares a rule contrary to that declared in the earlier cases.

However, the motion to dismiss is also upon the ground that appellants have failed to comply with the rules of this court with respect to filing briefs. The brief con-

2. tains less than one page of type-written matter, and does not in any way comply with the rules. It appears to have been prepared with none of that care that should be exercised in preparing briefs, and meets none of the requirements of a brief. The brief wholly fails to present any question for review.

Appeal dismissed.

HEARD v. THE STATE.

[No. 6,205. Filed June 29, 1906.]

1. **ATTEMPTS.**—*Provoke.*—*Assault.*—*Intent.*—*Evidence.*—Intent is an essential element of the offense of attempting to provoke an assault, and may be proved either by positive or circumstantial evidence. p. 512.
2. **SAME.**—*Intent.*—*Evidence.*—Where language used by the defendant, together with his conduct, was capable of an inference that defendant, who had the present ability, was threatening the prosecuting witness with personal violence, a conviction for attempt to provoke an assault is justifiable. p. 512.
3. **APPEAL AND ERROR.**—*Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence. p. 513.

From Orange Circuit Court; *Thomas B. Buskirk*, Judge.

Prosecution by the State of Indiana against Charles W. Heard. From a judgment of conviction, defendant appeals. *Affirmed.*

Perry McCart, for appellant.

Charles W. Miller, Attorney-General, *W. C. Geake*, *C. C. Hadley* and *Henry M. Dowling*, for the State.

COMSTOCK, P. J.—The appellant was charged and convicted in the court below of an attempt to provoke another to commit an assault. From that judgment he appeals, and

under the assignment of errors he insists that the evidence does not sustain the judgment of the court, in that it does not show an intent upon the part of the defendant.

Intent is an essential element of the offense charged in the case. It may be proved like any other material fact, by positive or circumstantial evidence. Courts and

1. juries are permitted to draw reasonable inferences from the facts proved. The question of intent was one of fact to be determined by the court, and the only question before us is: Was there any evidence submitted to the trial court upon the question of appellant's intent to commit the offense with which he was charged and convicted? If there was evidence, positive or circumstantial, from which the trial court could infer such intent, then this court will not be justified in disturbing the judgment. *Felton v. State* (1894), 139 Ind. 531; *Deal v. State* (1895), 140 Ind. 354.

John Hollingsworth, a witness for the State, testified that he saw the appellant and the prosecuting witness, Mr.

2. Lambdin, on August 26, 1904, in front of a livery barn in Paoli, Orange county, Indiana; that they were about six or eight feet apart, with nothing between them; that he heard the appellant say to the prosecuting witness: "You have been tending to my business lately and now I am going to tend to yours, and I do not know how you are going to help yourself. If you are, get at it, or if you have any friends here to help you, let them get at it;" that Lambdin at the time was reading a temperance article, and that defendant's manner was angry and insulting.

Samuel R. Lambdin, a witness for the State, testified that he was sitting in front of a livery barn in Paoli, Orange county, Indiana, reading aloud some articles on temperance, in the presence of some other persons; that appellant came up, listened to the reading, and said to one of the persons present: "Here is Bob Lambdin. He came from Crawford county and is reading a temperance lecture;"

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that Lambdin told him to go on, that he was not bothering him; that appellant further said: "If you have any way to help yourself I would like to know how you are going to do it, and if you have any friends to help you I would like to know how they are going to do it."

There is some conflict in the evidence as to what was said by and between the parties to the controversy, and also whether appellant's manner was angry and insulting. We cannot say that the language used as above set out can reasonably be understood in any other light than that of an invitation to engage in a physical encounter, and cannot say that there was no evidence to sustain the judgment.

The record presents only questions of fact passed upon by the trial court, and, as we cannot say that there was no evidence to warrant the conclusion of the court, and

3. cannot weigh the evidence, we cannot disturb the judgment.

Judgment affirmed.

UNION TRACTION COMPANY OF INDIANA v. SULLIVAN.

[No. 4,997. Filed November 28, 1905. Rehearing denied January 26, 1906. Transfer denied June 29, 1906.]

1. **STREET RAILROADS.—Passengers.—Riding on Running-Board.—Contributory Negligence.**—A passenger riding on the running-board of a street car is not guilty of contributory negligence as a matter of law. p. 519.
2. **TRIAL.—Contributory Negligence.—Burden of Proof.—Verdict.—General.**—Contributory negligence is a defense in actions for personal injuries, and a general verdict for plaintiff is a finding of freedom from such negligence. p. 519.
3. **SAME.—Verdict.—General.—Special.—When Controlling.**—The answers to the interrogatories to the jury control the general verdict only when they are irreconcilable therewith upon any state of facts provable under the issues. p. 520.
4. **STREET RAILROADS.—Care Required.—Passengers.—Presumptions.**—A passenger on a street car has the right to presume that all necessary precautions have been taken by the company for his safe transportation. p. 520.

5. **STREET RAILROADS.—Passengers.—Contributory Negligence.—Questions for Jury.**—A passenger on a street car, who knowingly exposes himself to a danger such as ordinarily prudent men would not encounter, or who, by the exercise of ordinary care, could avoid danger and who fails to do so, is guilty of contributory negligence, and these questions are usually for the jury. p. 520.
6. **SAME.—Passengers.—Riding on Running-Board.—Presumptions.**—Passengers riding on the running-board of a street car are presumed to be so riding with the consent of the company. p. 521.
7. **SAME.—Bridges.—Passengers.—Notice.—Contributory Negligence.—Question for Jury.**—Because a passenger knows of a bridge and has ridden over it, does not, as a matter of law, render him guilty of contributory negligence in riding over same on the running-board of a street car, such question being for the jury. p. 522.
8. **SAME.—Passengers.—Notice of Defects.—Contributory Negligence.—Question for Jury.**—It is a question for the jury whether plaintiff was guilty of contributory negligence in riding, facing backward, on the running-board of a street car through a bridge of which he had a general knowledge and in which he was struck by a post and injured, the car being crowded except the front vestibule, and the conductor knowing of plaintiff's position, the fact that no other person was ever so injured being a fact for the jury's consideration. p. 522.
9. **TRIAL.—Negligence.—General Damages.—Special.—Loss of Time.**—It is erroneous to permit plaintiff, in an action for personal injuries, wherein he demands general damages only, to recover damages for loss of time, earning capacity or business loss, such damage being special. p. 527.

From Randolph Circuit Court; *J. W. Macy*, Judge.

Action by Martin Sullivan against the Union Traction Company of Indiana. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Reversed.*

Gilbert R. Call, James A. Van Osdol and Engle, Caldwell & Parry, for appellant.

George H. Koons and Benjamin F. Marsh, for appellee.

MYERS, J.—Appellee instituted this action against appellant to recover damages for personal injury. The action was begun in the Delaware Circuit Court, and on change of

venue, was sent to the Randolph Circuit Court, and there tried before a jury, resulting in a verdict for appellee and judgment on the verdict.

This cause was tried upon an amended complaint in one paragraph, in which it is averred that appellant is the owner of and engaged in operating an electric street railway in the city of Muncie, and suburbs thereof, and that one of its lines crosses a bridge over White river, on which line it used what is known as open, summer cars; that on August 29, 1901, appellee was a passenger on one of such cars, and while riding on the running-board thereof collided with a post forming a part of the upper structural work of said bridge, and was knocked off and injured. The complaint alleges negligence in running said cars in such close proximity to said post as to endanger the life and limbs of passengers so riding; that appellee did not know of the danger of colliding with said post and was not warned by appellant or anyone else of the danger therefrom; that the car was filled with passengers, leaving the running-board the only place for appellee to ride at the time of boarding the car; "that by reason of the negligence of the defendant, as aforesaid, plaintiff's body struck the iron post on the southwest end of said bridge with great force and violence, causing him to lose his footing upon said car and fall off upon the girders, ties and rods at the side of and on said track and against said car, whereby plaintiff was greatly and painfully injured and suffered a long, deep cut and bruises on the left side of his head, a painful cut and bruise on his left shoulder, a fracture of the eighth rib on the left side, and numerous painful bruises upon various parts of his body, and suffered a severe shock to his entire system; that by reason of said injury and the suffering and pain consequent therefrom, plaintiff has been damaged," etc. Appellant answered by general denial.

I. Appellant assigns as error in this court the overruling of its motion for judgment on the interrogatories and an-

swers thereto, notwithstanding the general verdict. There were 158 interrogatories submitted to the jury, which they answered and returned with their general verdict. By this great number of interrogatories substantially the following facts are found: Sometime before August 29, 1901, the day appellee received his injury, a bridge across White river had been constructed, and from the time of its construction until the day of the accident it had been maintained by Delaware county or the city of Muncie, and not by appellant. It was so constructed and maintained that the center portion of the same was used as a wagonway across said river, and on either side of this wagonway at the entrance of the bridge from the city of Muncie were upright iron or steel posts about thirty feet high, forming part of the structural work thereof. On the west side of this wagonway and from the iron or steel posts said bridge was extended, and this extension was used by appellant for its street car tracks in crossing the river with its cars. On said August 29, and for ten or twelve years prior thereto, appellant had been engaged in operating street cars by electricity in and through the streets of the city of Muncie and over this bridge, and on said day, at about 9 o'clock in the evening, appellee, being in the city of Muncie, desired to go to the fair grounds, the place where he was then engaged in taking care of horses, and with a companion boarded one of appellant's cars, No. 107, at a point in the city of Muncie, for the purpose of being carried as a passenger to his destination, which was across the bridge. Said car No. 107 was one used by appellant and run over its line from the city of Muncie across the bridge and to the fair grounds. Said car was one known as an open, summer car, a little over twenty-nine feet in length, having a vestibule in each end, the front vestibule used and occupied by the motorman, and a general passenger apartment, divided into eight spaces by posts, about two inches thick, on either side, extending from the bottom of the car to and supporting the roof, and

seats extending across the car between the posts. On each side of the car was a running or foot-board extending almost the entire length of the car, and used for the convenience of passengers in their ingress to and egress from the car, and for the convenience of appellant's employes in charge thereof. This foot-board was about seven inches wide and about one foot and ten inches below the floor of the car, and its outer edge about nine inches from the edge of the car floor. When appellee and his companion boarded the car the same was filled with people, some standing between the seats, and the rear vestibule filled by people standing therein, the motorman being the only person occupying the front vestibule. It was customary at the time of appellee's injury, when the cars were crowded, for passengers to stand in the front vestibule and between the seats in the main passenger compartment when such seats were filled, and it would have been possible for appellee to stand between the seats of this car or in the front vestibule. Appellee and his companion boarded the car a little to the rear of the center of the same, and appellee, after looking for a seat, took an erect and upright position directly opposite one of the upright posts and stood on the running-board with his back in the direction the car was moving, and with his right arm around one of such upright posts, his companion assuming a position standing on the running-board, with his left arm around one of the upright posts of the car, the two facing each other, which position they occupied, carrying on a conversation between themselves from the time they boarded the car in the city of Muncie until they reached the bridge, and appellee's head, near his left ear, and his left shoulder and arm came in contact with said iron or steel post, and he was knocked off of the car and injured. Appellant gave no warning of the car's approach to the bridge, nor was any warning given by any one to the knowledge of appellee. It is also found by the jury that appellee could have leaned in and between said upright

posts or stood with his body against and parallel with said car and erect and would have escaped injury. Appellee by reason of said conversation was not unconscious of the general progress, course and location of said car, nor of the ordinary happenings and occurrences in and about the same, and had he been facing the front or watching the general progress, course and direction, and the manner in which the car was running he could have observed the bridge before he was injured; but there was no evidence as to the distance a person of ordinary eyesight could see the bridge before the car entered it. The space between the floor of the car and the structural work of the bridge was thirteen and three-fourths inches, and at the time of the injury the car on which appellee was a passenger was moving at the rate of about twelve miles per hour; and had appellee been standing erect upon said running-board and neither leaning toward nor from the structural work of the bridge he would have come in contact with the iron or steel posts. At that time, and each year for several years prior to the day of this injury, fairs, and occasionally other public entertainments, were held at said fair grounds, and frequently passengers on cars operated on this line, including the one on which appellee was riding, were permitted to and did stand on the running-boards thereof. At the time appellee was injured there were five or six persons on the running-board of the car on which appellee was standing. Appellee had been a resident of the city of Muncie for about ten or twelve years prior to the time of receiving the injury, and knew of the bridge and the general manner of its construction, and knew that in order to reach his destination that evening he would pass over it, having theretofore crossed the bridge in appellant's cars. At the time appellee was injured the car was brilliantly lighted with a number of electric lights and was equipped with a lighted headlight on the front end thereof. Both sides of the car were open and unobstructed, except for

its upright posts, and appellee was the first passenger ever injured by coming in contact with the iron structural work of the bridge. On the evening of the injury a person upon the car observed appellee's position and that he would likely come in contact with the bridge, called to appellee in substantially the following words: "Look out, stranger, the bridge will hit you," but appellee did not hear said warning. Appellee was not warned by the motorman or the conductor of the car's approach to the bridge. Appellee at the time of his injury was thirty-three years old and was earning \$12 a week, and on account of his injury was unable to work at his usual occupation for a period of six weeks.

It has been a number of times held by this court, and appellant concedes, that it is not negligence *per se* for a passenger to ride on the running-board of a crowded

1. car propelled by electricity. *Marion St. R. Co. v. Shaffer* (1894), 9 Ind. App. 486; *Terre Haute Electric R. Co. v. Lauer* (1899), 21 Ind. App. 466; *Citizens St. R. Co. v. Hoffbauer* (1900), 23 Ind. App. 614; *Frank Bird Transfer Co. v. Morrow* (1905), 36 Ind. App. 305.

But appellant contends that because there was room in the front vestibule of the car upon which appellee was riding, and where he might have been carried in safety, and because of the position he took while standing on the foot-board of the car, such facts, as a matter of law, rendered him guilty of contributory negligence, and he should not recover.

In this State contributory negligence is a matter of defense (*Southern Ind. R. Co. v. Peyton* [1902], 157 Ind. 690; *City of Evansville v. Christy* [1902], 29 Ind.

2. App. 44), and when interposed to defeat an action for personal injury, it is necessarily one of the questions before the jury and answered by their general verdict. This rule obtains in the case at bar, and, the

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general verdict being in favor of appellee, it is in effect a finding in his favor and against appellant on that issue. It is also a finding against appellant and in favor of appellee upon every issuable fact necessary to sustain

3. appellee's cause of action, when sought to be overthrown by "special facts found by the jury in answer to interrogatories propounded to them." It carries to its support every presumption and inference of fact which might have been drawn from the evidence properly admitted under the issues, and will yield only after resolving all reasonable presumptions against such isolated facts and "one or the other is necessarily erroneous." *Albany Land Co. v. Rickel* (1904), 162 Ind. 222; *City of South Bend v. Turner* (1901), 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200; *Union Traction Co. v. Barnett* (1903), 31 Ind. App. 467; *Chicago, etc., R. Co. v. Stephenson* (1904), 33 Ind. App. 95.

The law as deduced from the great number of decisions cited in the case of *Citizens St. R. Co. v. Hoffbauer, supra*, clearly expresses the degree of care and diligence

4. required of street car companies regarding the safety and protection of its patrons from danger. It also announces the rule that "a passenger has the right to presume, in the absence of knowledge or warning to the contrary, that all necessary precautions have been and will be taken for his safe transportation." From the doctrine declared in that case we have no reason to recede.

It is true, if appellee knowingly exposed himself to danger such as an ordinarily prudent person under the circumstances would not have done, and was

5. thereby injured, or if by reasonable precaution he could have foreseen the danger and avoided the injury, he ought not to be allowed damages. *City of Evansville v. Christy, supra*; *Aikin v. Frankford, etc., R. Co.* (1891), 142 Pa. St. 47, 21 Atl. 781. But these are questions, under our jurisprudence, generally for the jury, the

exceptions being where the exact standard of duty is fixed, or, as said in the case of *Citizens St. R. Co. v. Hoffbauer*, *supra*: "If they find facts which show a failure to attain that standard, the law declares negligence exists. The conduct of the complaining party in such cases is such as to shock the mind of an ordinarily prudent person and shows a plain disregard for common care and caution. In such cases a court may well say that the party's conduct showed a plain and reckless disregard for his own safety. But a court may not declare that negligence does or does not exist in any case simply because the facts are undisputed. But the question is, even though the facts be undisputed, is there room for difference of opinion as to the inferences and conclusions that may be drawn from these undisputed facts? If the inference of negligence, or its absence, necessarily follows from the undisputed facts, it is a question of law; if not, it is for the jury. 'In the ultimate determination of the question,' says Beach, *Contrib. Neg.* (3d ed.), §452, 'whether the plaintiff was guilty of negligence, two separate inquiries are involved: first, what was ordinary care under the circumstances? and second, did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard.' "

The complaint places the iron posts of the bridge within a few inches of the car as it entered the bridge; the distance as found by the jury being thirteen and three-

6. fourths inches. The complaint avers an insufficient width between the iron posts of the bridge and the cars operated by appellant on that line to permit the passage of passengers standing on the running-boards thereof. The special facts show that appellee might have occupied a position whereby he could have avoided the

collision and injury. There were other persons standing on the running-board with appellee. We must presume they were all there with the knowledge and consent of appellant's employes in charge of the car. They were not warned of the danger attendant by the proximity of the car to the iron posts of the bridge, and we cannot

7. say as a matter of law, over appellee's positive denial, that because he had a general knowledge of the construction of the bridge, and because he had ridden over the bridge in appellant's cars, he was thereby possessed of such knowledge of the danger consequent on his riding on the running-board of the car as would show "a plain disregard for common care and caution," and impute to him such negligence in case of injury as would relieve appellant from giving him warning of the danger of a collision with the bridge posts. Whatever knowledge might be inferred and attributed to him from these facts was a question for the jury, and by them to be considered, together with all the other facts in the case, as affecting the question of contributory negligence. *Indiana, etc., Oil Co. v. O'Brien* (1903), 160 Ind. 266.

From the record it appears that appellee was a man of average size. His position on the car when the collision happened was the same as that assumed by

8. him shortly after taking passage thereon. He paid his fare to the conductor in charge of the car. Nothing was said to him about standing between the seats or in the front vestibule. There is no evidence that appellee knew that passengers were allowed to stand in the front vestibule with the motorman upon occasions when the car was otherwise crowded with passengers. There is no showing that appellee knew the front vestibule was not fully occupied by passengers. It seems that others were on the running-board as well as appellee, a fact which might have been considered by the jury as to whether appellee was acting as a cautious and prudent person in

standing upon the foot-board. The jury found the width of the foot-board, and that appellee was standing in an erect position, and that the side of the car slightly projected out over the foot-board. From these latter facts the inference might follow that the right side of appellee was against the side of the upright post used in sustaining himself on the car. Whether the other persons on the foot-board were toward the rear or the front of the car from appellee does not appear, nor does their position on the foot-board appear, except as to appellee's companion. The fact that no other passenger was ever injured by coming in contact with the upper structural work of the bridge, during the long use thereof by appellant, was a fact to be considered by the jury, but that fact alone would not relieve appellant from liability, if it maintained its road so as to endanger the lives and limbs of its passengers while riding on that part of its cars so used by its invitation and with its permission, and recognized by the public as a place for the carriage of passengers.

In the case of *Thane v. Scranton Traction Co.* (1899), 191 Pa. St. 249, 253, 43 Atl. 136, 71 Am. St. 767, the court, in speaking of the rule applicable to the risk assumed by a passenger on the platform of a car in case of vacant seats inside, and when the car is crowded, held, in the latter case, that a passenger, if admitted upon the car, "must stand on the platform with its rods, etc., to hold by, or inside with a strap for that purpose. He is presented with a choice of evils, and his action must be judged by the jury, while on the other hand the carrier by receiving him undertakes and gives him assurances that it will take care of him and guard him against accident as far as the circumstances permit."

The case of *West Chicago St. R. Co. v. Marks* (1899), 82 Ill. App. 185, in many respects, is very similar to the case now under consideration. In that case Marks was a passenger over the company's line crossing Desplaines

street viaduct. He was riding on the foot-board of a car, the seats of which were all occupied, and the aisles, platform and foot-boards were partly filled by people standing. In crossing the viaduct appellee was struck by one of the upright iron posts of the truss and was knocked off of the car and injured. The distance of the car from the projections of the truss was estimated to be from twelve to nineteen inches, and by using extra precautions such as bending the body in toward the body of the car or by standing straight up and close against the side of the car a passenger on the foot-board could pass in safety. Marks claimed not to know of the viaduct's being on that route until he was hit.

The court in passing upon this case, after quoting as follows from *North Chicago St. R. Co. v. Williams* (1892), 140 Ill. 275, 29 N. E. 672, "where a railroad company places its tracks so near an obstruction, which it is necessary for its cars to pass, that its passengers, in getting on or off the cars, and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury, whether the company is, or is not, guilty of negligence. * * * It has been held that it is inexcusable in a railroad company to permit an obstruction to stand so near its track as to render the use of the step or running-board dangerous to life or limb, inasmuch as exceptional cases may arise when it is lawful and proper for even a passenger to use such stepping-board;" said: "Such doctrine must be doubly sound, when, as in this case, the company has, by persistent usage, allowed, and tacitly invited, its passengers to ride upon the foot-boards of its cars in such perilous proximity to dangerous obstructions, without warning of the risk." And upon the question of contributory negligence said: "It was for the jury to say whether appellee had knowledge or notice of the existence of the proximate danger, or ought, under the circumstances, to have had it. We do not say that if the

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appellee had known of the viaduct the cars were to cross, *and of the location of the tracks with reference to the truss* [our italics] he would not have been bound to use more than ordinary care to avoid being hit, but we do hold that under the proved facts and circumstances, ordinary care for his own safety was all appellee was required to exercise, and that the verdict has settled that question in his favor, upon evidence that would not have properly warranted any other result." On the question in the case at bar, as to the ownership and maintenance of the bridge by the municipality, the court said: "It was no concern of the jury, so far as this case was concerned, what relationship existed between the city of Chicago and the appellant with reference to the use of the viaduct, nor whether the tracks were laid in the place they occupied by virtue of municipal direction. If as a matter of fact it were negligence for the appellant to lay its tracks so near the truss, and to operate them there without warning to passengers, no arrangement between it and the city concerning the matter would excuse the negligence in an action for damages because of it. *West Chicago St. R. Co. v. Annis* [1897], 165 Ill. 475, 46 N. E. 264; *West Chicago St. R. Co. v. Annis* [1895], 62 Ill. App. 180."

In *Elliott v. Newport St. R. Co.* (1893), 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, it is held that a passenger riding on the running-board of a street car was charged with the duty of protecting himself against the usual and obvious perils to which the public highway is used, but not the danger of being hit by a trolley pole, and the question of negligence is one for the jury.

In *City R. Co. v. Lee* (1888), 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. 798, where a foot-board passenger was knocked off the car by colliding with a like passenger on another car going in the opposite direction, the court held that while such injured person was bound to take knowledge of the ordinary uses of the street, he was not presumed

to know that the company's road was constructed or its cars so run as to render a position in which it invites him to ride a dangerous one, and the question of contributory negligence is one for the jury.

In *Dickinson v. Port Huron, etc., R. Co.* (1884), 53 Mich. 43, 18 N. W. 553, it is held that the question of contributory negligence, where a passenger, while on the running-board of a car, was injured by colliding with coal bins standing on the track, coming within eleven and one-half inches of the side of the car, and within two inches of the step upon which plaintiff stood, and which could have been seen from the approaching car for a distance of 1,200 feet, had the passenger looked, was for the jury.

Without extending this opinion for the purpose of referring specially to other cases, see the following: *Burns v. Bellefontaine R. Co.* (1872), 50 Mo. 139; *Nolan v. Brooklyn, etc., R. Co.* (1881), 87 N. Y. 63, 41 Am. Rep. 345; *Cummings v. Worcester, etc., St. R. Co.* (1896), 166 Mass. 220, 44 N. E. 126; *Smith v. St. Paul City R. Co.* (1884), 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Faris v. Brooklyn, etc., R. Co.* (1899), 61 N. Y. Supp. 670; *Hassen v. Nassau Electric R. Co.* (1898), 53 N. Y. Supp. 1069; *Matz v. St. Paul City R. Co.* (1893), 52 Minn. 159, 53 N. W. 1071; *Graham v. McNeill* (1899), 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121; *Corlin v. West End St. R. Co.* (1891), 154 Mass. 197, 27 N. E. 1000.

From the record now before us it appears that at the time of the injury the night was dark and cloudy and with every appearance of rain. The jury found that had appellee been looking in the direction in which the car was moving he could have seen the bridge before he was injured, but whether in time to change his position and avoid the injury does not appear; but, under the presumption prevailing in favor of the general verdict and against the isolated facts, it may be presumed that he could not. His

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companion testified that he was facing toward the bridge, but did not see it until after the collision. We are therefore not convinced that there is such antagonism between the general verdict and the facts as specifically found by the jury as to warrant us in saying that both cannot stand.

II. The second error relied on by appellant is the overruling of its motion for a new trial. What we have said in disposing of the first error in a large measure applies to the first and second subdivisions discussed by appellant under this error, and is against appellant's contention.

The case of *Craighead v. Brooklyn City R. Co.* (1890), 123 N. Y. 391, 25 N. E. 387, is not applicable to the case at bar, for the reason that the facts in the two cases are widely different.

Other reasons assigned for a new trial are based upon the ruling of the court in admitting evidence over appellant's objection, tending to prove the amount of

9. money appellee was receiving per day for services at the time of his injury, and that instruction seven, given by the court upon its own motion, authorizing the jury in case they found for appellee to consider in assessing damages "any suffering, loss of time, loss of ability to earn money in his personal vocation at the time of the injury, and any personal derangement or impairment of the plaintiff physically." Appellant contends that this evidence tended to prove, and this instruction permitted the jury to consider, special damages, when under the issues only general damages are allowed.

A witness for plaintiff, on his original examination, was permitted to give evidence as to the kind of work appellee was doing and for whom, at or about the time of receiving the injuries of which he complained. Following this evidence he was asked this question: "Tell the jury what he [Sullivan] was earning per day or month at the time he received these injuries; where he was working, if you know." To this question appellant interposed the follow-

ing objection: "I object to the question because it is not within the issues of the case, but seeks to prove an element of special damages not averred in the complaint. There is no damage claimed for the loss of earning capacity, and for that reason it is incompetent." The trial court overruled this objection, and the witness was permitted to answer as follows: "Well, he was earning \$2 a day."

Appellee by his complaint demanded of appellant only such damages as the law implies as resulting from his physical injuries alone, and are what may be termed general damages. There is no claim for special damages such as accrue from loss of time or for any interference with his business, trade, or profession.

In an action for personal injury all damages which actually and proximately result from the wrongful act complained of may be recovered. While this is true, it is the settled law that while the effect of the injury may cause a loss of time or interfere with the business, work, trade or profession of the party injured, resulting in his damage, such damage is to be regarded as special, provable only when specifically averred in the complaint. This latter rule is based upon the theory that the law will not imply from the injury alone the damages peculiar to and resulting in each individual case. *Lindley v. Dempsey* (1873), 45 Ind. 246; *Ohio, etc., R. Co. v. Selby* (1874), 47 Ind. 471, 497, 17 Am. Rep. 719; *Baldwin v. Western R. Corp.* (1855), 70 Mass. 333; *Tomlinson v. Town of Derby* (1876), 43 Conn. 562; *Krueger v. Chicago, etc., R. Co.* (1902), 94 Mo. App. 458, 68 S. W. 220; *Brown v. Chicago, etc., R. Co.* (1883), 80 Mo. 457; *Chicago, etc., R. Co. v. Emmert* (1897), 53 Neb. 237, 73 N. W. 540, 68 Am. St. 602; *Chicago, etc., R. Co. v. Klauber* (1881), 9 Ill. App. 613; *Slaughter v. Metropolitan St. R. Co.* (1893), 116 Mo. 269, 23 S. W. 760; *Wabash, etc., R. Co. v. Friedman* (1893), 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; *Texas, etc., R. Co. v. Buckalew* (1893), 3 Tex. Civ.

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App. 272, 22 S. W. 994; *Coontz v. Missouri Pac. R. Co.* (1893), 115 Mo. 669, 22 S. W. 572; *Hunter v. Stewart* (1859), 47 Me. 419; *Comminge v. Stevenson* (1890), 76 Tex. 642, 13 S. W. 556; *Stevenson v. Smith* (1865), 28 Cal. 102, 87 Am. Dec. 107; *Hallock v. Belcher* (1864), 42 Barb. 199; *Morris v. Winchester Repeating Arms Co.* (1901), 73 Conn. 680, 49 Atl. 180.

If appellee was entitled to prove the character of his business, which was that of conditioning race horses, and the amount of time lost on account of his injuries, and follow it up by proof that at the time he was injured he was receiving \$2 a day, then on principle we see no reason why he might not, under allegations of a complaint merely describing his injuries, concluding with the general averment of damage, prove any damages, whether general or special, sustained for loss of time in any business, trade or profession, limited only to the test of resulting damages. But this is not the rule, as will be seen from an examination of the authorities last cited.

By instruction seven the jury was told that in assessing appellee's damages it might consider, among other things, "loss of time." The value of the time lost was fixed at \$2 per day, and, under the allegations of the complaint, was not a proper element of damages in the case at bar.

Appellant discusses one other cause for a new trial: that the court erred in giving instruction three asked by appellee. As this question may not arise on a second trial we will not consider it.

A new trial should be granted. Judgment reversed, with instructions to the lower court to sustain the motion for a new trial.

UNION MUTUAL LIFE INSURANCE COMPANY
v. ADLER.

[No. 5,186. Filed March 17, 1905. Rehearing denied November 3, 1905. Transfer denied June 29, 1906.]

1. PLEADING. — *Complaint. — Theory. — Sufficiency.*—A complaint drawn upon a definite theory should be good upon such theory, or is bad on demurrer. p. 536.
2. INSURANCE.—*Life.—Extension Tables.—From What Date Calculated.*—The table of extended insurance in a twenty-payment life policy, granting 7 years and 235 days' insurance upon the payment of three premiums, means 7 years and 235 days from the date of the policy and not from the date of lapse, such extension from the date of lapse being unreasonable. Roby, J., dissenting. p. 536.
3. SAME.—*Premiums.—When Payable.*—A twenty-payment life policy providing for the payment of the first premium in advance and for a like amount annually thereafter for twenty years, requires such following annual premiums to be made in advance. p. 537.
4. SAME.—*Premiums.—Period Covered by Payments of.—Debts.*—The payment of the annual premium on a life policy continues the insurance upon assured's life for such year and gives him the right to continue such payments at the same rate, and such premiums do not constitute a debt. Roby, J., dissenting. p. 538.
5. PLEADING. — *Complaint. — Insurance. — Life. — Extension.*—A complaint for the recovery of insurance, alleging that plaintiff's decedent duly paid four annual premiums on a twenty-payment life policy, by which he secured an extension of such policy for 10 years by virtue of the table of extended insurance, and that decedent died within such time, shows that such policy was alive at decedent's death. p. 538.
6. BILLS AND NOTES.—*Negotiable.—Payment.—Presumptions.*—There is a disputable presumption that a negotiable note is a payment of the debt for which it was given. p. 539.
7. INSURANCE.—*Life.—Premiums.—Payment.—Bills and Notes.*—The failure of assured to pay his negotiable note, conditioned that if not paid when due the policy, for whose annual premium such note was given, lapses as for nonpayment of premium, does not keep such policy alive as a payment of such premium. pp. 539, 540.

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8. **INSURANCE.—Forfeiture.—When Enforced.**—Forfeitures are odious, but will be enforced where there is no reasonable excuse for the default. p. 539.
9. **SAME.—Premiums.—Notes Given for.—Election.**—The payment of a negotiable note, given for an annual premium on a life policy, and providing that if not paid at maturity such policy lapses as for nonpayment of premium, is optional with the assured and not with the insurer. Roby, J., dissenting. p. 540.

From Warrick Circuit Court; *E. M. Swan*, Judge.

Action by Hiram J. Adler, as administrator of the estate of Leopold Adler, deceased, against the Union Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

John E. Iglehart, Edwin Taylor and Eugene H. Iglehart, for appellant.

Edwin C. Henning, Charles A. Weathers, Howard S. Young and Sol. H. Esarey, for appellee.

COMSTOCK, C. J.—The amended complaint was in three paragraphs, each upon a policy of insurance issued by appellant to Leopold Adler. Action was commenced in the Superior Court of Vanderburgh County, and upon change of venue tried in the Warrick Circuit Court.

It is alleged in the first paragraph of complaint that Hiram J. Adler, plaintiff, is administrator of the estate of Leopold Adler, deceased; that said defendant was and is a corporation created, organized, and existing under and by virtue of the laws of the state of Maine; that on July 31, 1893, in consideration of the payment of the premium of \$97.80 annually for a period of twenty years, unless death should sooner occur, said defendant executed its policy of insurance in writing (a copy of the policy is made a part of the complaint as an exhibit) to Leopold Adler on his life in the sum of \$3,000; that as a further consideration for said policy of insurance it was agreed by and between said defendant and said Leopold Adler that should

said Leopold Adler pay to said defendant three annual premiums of \$97.80 each in cash before lapse in payment of premiums, then said policy of insurance would be secured in force for the sum of \$3,000, and for a period of 7 years and 235 days without any further payment of premium thereon; that prior to the death of said Leopold Adler said decedent paid to said defendant three annual premiums of \$97.80 in cash on said policy, and thereupon ceased to pay any further premiums on said policy; that by reason of said three payments in cash of said three annual premiums on said policy, the last of which was made to and paid to said defendant on July 15, 1895, said policy of insurance was secured and continued in force for a period of 7 years and 235 days; that before the expiration of and within said 7 years and 235 days said Leopold Adler departed this life, to wit, December 20, 1901; that said decedent, Leopold Adler, and said plaintiff each duly performed all conditions of said policy on their part to be performed; that said plaintiff on December 6, 1902, gave the defendant due notice and proof of death of said Leopold Adler, and demanded payment of said policy; that said defendant on December 30, 1902, refused to pay said policy, and still refuses to pay the same, and no part of it has been paid. Wherefore he demands judgment against defendant in the sum of \$3,255.

The second paragraph of complaint differs from the first in the averment of the payment of four annual cash premiums instead of three, and consequently a longer extension.

The third paragraph sets out the exact manner of making payment of the fourth annual premium, the giving of the note, and treating it as payment of premium under the law. An extension of the insurance under the policy for 10 years and 116 days it is claimed was secured.

A copy of the policy is made a part of each paragraph. A demurrer to each paragraph for want of facts was over-

ruled. The motion to make more specific said first, second and third paragraphs of complaint was overruled.

The defendant answered in three paragraphs. The substance of the first is contained in the second and third, so far as the issue relates to an extension of the life of the policy under the Maine nonforfeiture law and the construction of the table, exhibit A of each paragraph of the complaint. The table is again set out in the answer, and it is averred to be the agreement and provision contained in said policy upon which plaintiff relies in his amended complaint. The table is averred to be the calculation under the Maine nonforfeiture law, which shows the period for which said insurance was secured after the payment of three or more annual premiums thereon, as provided by said law; and it is under the provisions of said law and under the table calculated thereunder, indorsed on said contract of insurance and part of said policy sued on, that the plaintiff claims the securing in force of said policy for a period longer than the period for which premiums were actually paid thereon. Said paragraph also sets out *in haec verba* the written and printed application as a part of the consideration for the insurance contract. It avers the payment of only three premiums, and "that at the death of said Leopold Adler the term of life of said policy, as determined according to the Maine nonforfeiture law, according to the age of the insured, which is averred, and the assumption of mortality and interest, as set out in said law, was a period of 7 years and 235 days from the date of said policy, and not from the date of lapse, at the end of which period any and all right existing in said Leopold Adler, or in the plaintiff as his administrator, under and by virtue of said full payment in cash of the first three annual premiums due upon said policy ceased and determined, and said Leopold Adler or the plaintiff was entitled to no further extension of time thereon, but at the expiration of said period * * * said policy became wholly

void." It is also averred that said full period of time had expired before the insured died, and said policy was not in force at his death. The issue tendered by said first paragraph is also tendered in the second paragraph of the answer, but as to the distinguishing averment of the second paragraph of the complaint, that four annual premiums had been paid, the second paragraph of the answer denies the fact, and avers that only the first three premiums were ever paid. In other respects the second is a copy of the first paragraph of the answer.

The third paragraph of the answer contains all of the material averments of the first, and in addition deals with the questions which plaintiff seeks to raise by pleading his evidence—the note which was given for the fourth premium. It denies payment in cash of the fourth premium, and denies the loan of any money, as averred in the complaint. After setting out the Maine law, the table under that law, and the application, the answer continues: "Defendant further avers that the intention of the parties to said contract of insurance, apparent from all said writing, including the note hereinafter set out, which was executed under the provisions of said Maine nonforfeiture law, was and continued to be that if at any time said decedent elected to refuse to pay said annual premium required as a consideration of said policy, or any note given therefor, the said policy should cease to be in force except as it might be extended by the nonforfeiture law as herein set out, or in case a note was given for any premium except as provided therein."

Upon the subject of the note in the transaction the answer continues: "Defendant further avers that when the fourth annual premium upon said policy became due said Leopold Adler did not pay said premium, but at his request the defendant allowed him to give his note for the amount of said premium, payable in three months from date, which note is in words and figures as follows, to wit:

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'\$97.80 Evansville, Indiana, July 15, 1896.

For value received by a loan on a policy No. 104,557, issued by the Union Mutual Life Insurance Company, three months after date I promise to pay to the order of said company \$97.80 at Evansville, Indiana, German Bank.

This note is given on account of said policy, and unless paid when it becomes due said policy then lapses as for nonpayment of premium when due.
No. 7,547. Leopold Adler.

C-o Adler Bros.

Due October 15, 1896.'

That thereupon said insurance under said insurance policy was carried for a period of three months previous to the maturity and nonpayment of said note; that said note at its maturity was wholly unpaid, and has never been paid, and when the same became due payment was demanded by the defendant of said Leopold Adler, who then and there refused to pay said note, and the defendant thereupon notified said Leopold Adler that said policy was then and there determined and lapsed, and thereupon defendant canceled said note, and stamped the cancelation thereon, and held the same for naught, and this is the retention of the note mentioned in the complaint. And defendant tenders said canceled note to plaintiff, and defendant denies that it loaned any money to plaintiff's intestate as averred in the complaint, or that said fourth annual premium was paid in cash or secured except by said note."

Plaintiff's demurrer to each paragraph of answer was sustained. Defendant excepted, and refused to plead further, upon which the court rendered judgment for the plaintiff on demurrer for \$3,077. On December 22, 1903, defendant excepted and prayed an appeal.

The errors assigned are the overruling of the demurrer to the first, second and third amended paragraphs of complaint, and each of them; the overruling of a motion to make the first, second and third paragraphs of

the complaint, and each of them, more specific; and sustaining the demurrer to the first, second and third paragraphs of the amended answer, and each of them.

The question raised by the demurrer to the first paragraph of the complaint is whether the extension under the table—exhibit A—based upon the Maine nonforfeiture law, is calculated from the date of the policy or the date of the lapse in the payment of premiums. The same question is raised by defendant's answer to the first paragraph of the complaint, which sets out the Maine nonforfeiture law as far as it relates to the matter in controversy.

The substance of the first paragraph of the answer is contained in the first and second as far as the issue relates to an extension of the life of the policy under the

1. Maine nonforfeiture law and the construction of the table, exhibit A, of each paragraph of the complaint.

It is the theory of the first paragraph of the complaint that by the payment of three annual premiums in cash insurance under the policy was secured and continued in force for 7 years and 235 days from the date of the lapse in payment of premiums. This theory is definitely expressed. The paragraph should be good upon this theory or not at all. *Cleveland, etc., R. Co. v. Dugan* (1898), 18 Ind. App. 435, and cases cited.

2. In this claim of appellee we cannot concur.

The following is the language of the policy:

"In consideration of the written and printed application for this policy which is made a part of this contract, and of the payment in advance of \$97.80, and of the payment of the same amount yearly thereafter, at the office of the company in Portland, Maine, on the 15th day of July in every year (provided that when premiums for twenty full years have been fully paid no further premiums will be required) it is promised to pay to Leopold Adler, or his executor, administrators or assigns, at the office of the company in Portland, Maine, \$3,000, on satisfactory proofs of death of said Leopold Adler of Evansville."

The table which is a part of the exhibit shows that when three years' premiums are paid in cash before a lapse, insurance is secured under the policy for 7 years and 235 days. The extension of the insurance upon the three payments is only given by virtue of the table. The extension of the insurance after the payment of the premiums has ceased is based upon this table. The table alone provides for an extension of insurance, and from it we must determine from what time the insurance is secured for the 7 years and 235 days named.

If the theory of appellee is correct, the payment of three years' premiums would give an insurance of eleven years; of four, fourteen years; of five, sixteen years, etc. When it is remembered that the company is dependent upon the receipt of premiums for the money with which death losses are to be paid, the construction for which appellee contends seems unreasonable.

The policy, bearing date of July 31, 1893, and the written application, July 28, 1893, provide for the payment in advance of \$97.80, and of the payment of

3. the same amount yearly thereafter at the office of the company in Portland, Maine, on July 15. The first premium to be paid in advance, and subsequent premiums to be paid annually thereafter on the day fixed in every year, clearly requires the payment of the annual premiums in advance.

"The contract of life insurance is *sui generis*. It is one-sided. By the strict observance of the conditions of it, the insured may hold the insurers to their contract, while they have not the power or right to compel him to remain in contract relations with them longer than he chooses." *Roehner v. Knickerbocker Life Ins. Co.* (1875), 63 N. Y. 160, 167.

By the payment of the first premium the insured effects an insurance upon his life for one year, and purchases a

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right to continue that insurance from year to year

4. during life at the same rate. Whether he will continue or not is optional with him. The premium for the first year pays for the risk during that year, and ^{for} the right to subsequent insurance, but there is no obligation to pay further premiums. They do not constitute a debt. *Worthington v. Charter Oak Life Ins. Co.* (1874), 41 Conn. 372, 19 Am. Rep. 495.

The second paragraph of the complaint alleging the payment when due, in cash, of four annual premiums is good on demurrer as showing an extension of the insurance

5. over ten years under said table. In this connection it is proper to say that the answer to the second paragraph of the complaint denies the payment of four premiums, and alleges that only three were ever paid. The court erred in sustaining the demurrer to the second paragraph of answer.

The third paragraph of complaint alleges, as heretofore stated, that the deceased paid the fourth annual premium in cash by obtaining a loan of \$97.80 on his policy from said defendant; that the proceeds of said loan, to wit, \$97.80, were applied by said decedent and said defendant to the payment of said fourth annual premium on said policy; that in consideration of said loan of \$97.80 from said defendant said Leopold Adler executed and delivered to said defendant his promissory note for \$97.80, payable to said defendant and negotiable at the German Bank of Evansville, Indiana, which note is hereinbefore set out.

In its third paragraph of answer appellant avers that when the fourth annual premium on said policy became due said Leopold Adler did not pay said premium, but at his request the defendant allowed him to give his note for the amount of said premium, payable in three months from date, which note is the note hereinbefore set out; that thereupon said insurance was carried for a period of three months previous to the maturity and nonpayment of said

note, but that said note has never been paid, although the same was demanded by the defendant of said Leopold Adler, who then and there refused to pay the same, and defendant notified said Adler that the policy was then and there determined and lapsed, and the defendant canceled said note and stamped the cancelation thereon, and now tenders said canceled note in court to plaintiff, and defendant denies that it loaned any money to plaintiff's intestate as averred in the complaint, or that said fourth annual premium was paid or secured except by said note.

The acceptance of a promissory note payable in bank is presumed to be payment, but if it is agreed at the

6. time of its execution it is not to be accepted as payment that presumption is overcome.

The note in question specifies that it is given on account of the policy, and unless paid when it becomes due such policy lapses as for nonpayment of premium when

7. due. It is thus expressly agreed that the note was not accepted as payment. The payment of the note is made the test of the final payment of the premium. The failure to pay the note may not, in the absence of a provision in the policy for a forfeiture, work a forfeiture, yet it cannot be fairly held to have kept the policy alive as a payment. The decedent was bound by the entire note. Whatever right it gave him upon its execution was lost by its very terms by his failure to pay it at maturity. He could gain nothing by his own default.

It has many times been said by the courts that forfeitures are not favored, but they cannot avoid enforcing them when the party by whose default they are incurred cannot

8. show some good ground in the conduct of the other party on which to base a reasonable excuse for the default. *Thompson v. Knickerbocker Life Ins. Co.* (1881), 104 U. S. 252, 260, 26 L. Ed. 765.

The appellant could not compel the continuance of the insurance, and could not, therefore, compel the payment

of premiums, nor by the same reasoning could a
9. note given for the premiums be collected. The failure to pay the note is by its terms the failure to pay the premium. Had the note been a simple promissory note in the ordinary form it is possible that the insurance company would have had an option either to surrender the note and avoid the policy, or continue the policy and collect the note; but the rights of the parties are restricted by the conditions of the note, and the option as to its payment was with the insured, because the option of continuing the insurance was with him.

Said paragraph of answer further denies that appellant loaned any money to plaintiff's intestate, or that said fourth annual premium was paid in cash or secured except

7. by said note. In any event the only effect of the note could be, whether for a loan or otherwise, to keep the policy alive pending the maturity of the note, and which, if not paid, by its terms, was a failure to pay the fourth premium, leaving the rights of the parties to depend upon the terms of the contract of insurance and the extension under the Maine nonforfeiture law as for payment of three premiums only, which time had expired at the death of the insured.

The law will not exact from one party to a contract its full performance or its full penalty when the other contracting party, without good reason, fails to comply with the terms upon which his rights must depend. Whether in the case at bar the payment of the annual premiums was a condition precedent or subsequent, the right of the assured was based upon their payment according to the terms of the contract.

The judgment is reversed, with instructions to sustain the demurrer to the first paragraph of the complaint, and overrule the demurrers to the first, second and third paragraphs of the answer.

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Robinson, P. J., Black, Wiley and Myers, JJ., concur.
Roby, J., dissents.

ON PETITION FOR REHEARING.

COMSTOCK, J.—In this cause it appears from the view taken by the majority opinion of the facts as presented by the record that an attempt is made to enforce a contract without complying with its terms, and without the performance of the conditions upon which it is based. The petition for rehearing is overruled. We cite the cases of *Sharpe v. New York Life Ins. Co.* (1904), 5 Neb. (Unofficial) 278, 98 N. W. 66, and *New York Life Ins. Co. v. Meinkens* (1904), 25 Ky. Law Rep. 2113, 80 S. W. 175, to which our attention had not been called when the original opinion was written.

DISSENTING OPINION.

ROBY, J.—It is averred in the first paragraph of amended complaint that the defendant is a corporation organized under the laws of the state of Maine, and that on July 31, 1893, it executed its policy of insurance upon the life of plaintiff's decedent, for the sum of \$3,000, for the consideration of the payment of the premium of \$97.80 annually for a period of twenty years, unless death should sooner occur; that, as a further consideration, it was agreed that should the assured pay three annual premiums in cash before lapse in the payment of premiums, then such policy would be secure for 7 years and 235 days without any further payment. By virtue of said agreement the policy sued on, which is made an exhibit, was in force at decedent's death on December 20, 1901, he having paid the first three premiums thereon.

Much has been said in argument about the "Maine non-forfeiture law." The theory of the complaint is that the appellee company contracted to extend the obligation of its policy for the time named, if a lapse in payment occurred after three full premiums had been paid.

The contract is in writing. It is to be construed as other contracts of insurance, and where the language used is susceptible of different interpretations, or is doubtful, that meaning which affords the greatest indemnity, and is in the interest of the assured, must be adopted. *Union Cent. Life Ins. Co. v. Jones* (1897), 17 Ind. App. 592, 600; *Union Cent. Life Ins. Co. v. Woods* (1894), 11 Ind. App. 335; *Franklin Life Ins. Co. v. Wallace* (1884), 93 Ind. 7, 11.

In construing this contract, the laws of Indiana are applicable. *Kline v. National Benefit Assn.* (1887), 111 Ind. 462, 60 Am. Rep. 703; *Franklin Life Ins. Co. v. Wallace, supra*; *Northwestern, etc., Ins. Co. v. Little* (1877), 56 Ind. 504; *Supreme Lodge, etc., v. Meyer* (1905), 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146.

It may be that the terms of the policy were selected by the appellant because of the law of that state in which it is incorporated, or it may have been led to make such selection by the necessities of competition, but the reason, whatever it may have been, is immaterial, the rights of the parties being determinable by the terms of the contract which they have made.

The policy contains a table of which the following is a part:

"Number of years premiums paid in cash before lapse.	Maine nonforfeiture law. Insurance under this policy secured for	
	Years	Days
3	7	235
4	10	116
5	13	6 "

The object of the table is to notify the assured in advance of the length of time during which his insurance is effective after a lapse in payment of premiums. As long as premiums are paid the insurance is in force without reference to any table. After the payment of three premiums the assured who ceases to pay is given protection for a length

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of time fixed by reference to the amount paid by him in excess of the value of the protection which has been furnished prior to his failure thus to pay. The amount of such excess is determined by reference to the tables of mortality. Courts take judicial notice of both mortality and multiplication tables, and the time of extension in any given instance becomes therefore a matter of mere computation. The assured paid altogether \$293.40, as averred in the first paragraph of complaint. This amount was paid in three annual instalments on a twenty-payment life policy. At the end of the third year the reserve due to him was \$153.96, allowing \$26.01 out of each premium for the expenses of the company made necessary by handling this business, an allowance which is no doubt excessive. The sum of \$153.96 buys and pays for a nonparticipating, paid-up \$3,000 life insurance policy for the term of 6 years and 111 days. If the term specified in the table had been stated as 6 years and 111 days it would be exactly in accordance with the above computation, including the amount set aside for expenses. Whatever amount less than \$26.01 per year was deducted from expenses in making the actual computation upon which the table referred to is based would swell the fund available to buy paid-up insurance, and a very slight reduction in that item would result in extended insurance from the end of the third year of 7 years and 235 days.

The deduction for expenses was fixed by the company, and I am not disposed to attribute to it the segregation of a larger amount than its figures render necessary. The purpose of the table is to convey information to the person insured, or proposing to insure, relative to the term of extended insurance. It is not stated in the policy whether the extension dates from the end of the year for which payment is made, or from the time the policy was written, except as the purpose of printing the table of necessity implies carrying beyond the end, an inference which accords

with the custom of life insurance companies in printing such tables.

The terms of the contract are, to say the least, ambiguous and uncertain in this regard. It therefore becomes the duty of the courts to construe it, and such construction, under the familiar rule above stated, requires that the extension be dated from the end of the third year. The table as printed, if otherwise construed, is upon its face misleading and deceptive, and calculated to operate as a fraud upon the insured. No one is permitted to take advantage of his own wrong, nor will acute distinctions be drawn to aid in undoing the unwary; but a construction is always preferred which is according to the nature and intent of the thing.

The assured departed life 5 years and 155 days after the end of the third year. Something has been said about the unreasonableness of this extension. Results reached by mathematical computations based upon the multiplication and mortality tables are not usually put aside by the courts upon the mere statement that they are unreasonable. Indeed, the impressions of uninformed individuals are sometimes corrected by figures.

The second paragraph of complaint avers the payment of four cash payments. The answer denies the payment in cash of the fourth premium, and avers the execution of a note therefor dated July 15, 1896, and due three months after date, containing the provision that "this note is given on account of said policy, and unless paid when it becomes due said policy then lapses as for nonpayment of premiums when due," that thereupon said insurance was carried for a period of three months previous to the maturity and nonpayment of said note, and that said note has never been paid.

Forfeitures are not favored; they must be clearly and explicitly stipulated, and will not be inferred. *Home Ins. Co. v. Marple* (1891), 1 Ind. App. 411; *Glass v. Murphy*

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(1892), 4 Ind. App. 530, 536; *Bell v. Hiner* (1896), 16 Ind. App. 184; *Phenix Ins. Co. v. Lorenz* (1893), 7 Ind. App. 266; *Union Cent. Life Ins. Co. v. Jones* (1897), 17 Ind. App. 592, 598.

There is no provision in the policy under consideration for its forfeiture on account of nonpayment of premium, or for any other reason. In the light of the principles enunciated by the above authorities, no provision for such forfeiture can be read into it by any one. *Ohio Farmers Ins. Co. v. Stowman* (1896), 16 Ind. App. 205.

The note only provides for such lapse as is previously specified in the policy; and there being no such specification the provision in the note is inoperative, nugatory, and of no avail. *Dwelling-House Ins. Co. v. Hardie* (1887), 37 Kan. 674, 16 Pac. 92; *Drury v. New York Life Ins. Co.* (1903), 115 Ky. 681, 74 S. W. 663, 61 L. R. A. 714, 103 Am. St. 351.

The answers are drawn upon the evident theory that the failure of the assured to pay the note at maturity *ipso facto* released appellant from all liability upon the policy. This theory does not accord with the facts exhibited. If the note is valid in appellant's hands then it cannot deny the receipt of the fourth annual premium. *McEvoy v. Nebraska, etc., Ins. Co.* (1896), 46 Neb. 782, 65 N. W. 888.

Collection of this note from Adler's estate would fix the company's liability on the policy. *Phenix Ins. Co. v. Dungan* (1893), 37 Neb. 468, 55 N. W. 1069; *Phoenix Ins. Co. v. Lansing* (1884), 15 Neb. 494, 20 N. W. 22; *Schoneman v. Western, etc., Ins. Co.* (1884), 16 Neb. 404, 20 N. W. 284; *Phenix Ins. Co. v. Rollins* (1895), 44 Neb. 745, 63 N. W. 46.

It appears from the averments of the answer that the appellant, in consideration of said note, carried the insurance for three months. This being the case there is no failure of consideration, and the appellee's estate has been at all times liable for the payment of said sum. Even if the

policy had contained a provision for forfeiture, and the recital in the note therefore been effective, it would still have been competent for appellant to retain and collect the note. *Phoenix Ins. Co. v. Tomlinson* (1890), 125 Ind. 84, 9 L. R. A. 317, 21 Am. St. 203.

Where the policy contains no provision for a forfeiture, and the note in itself is not effective to that end, mere non-payment does not supply such provision of the policy.

I have thus stated a few of the numerous reasons why there should be a rehearing granted in this case.

CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY v. PHINNEY.

[No. 5,442. Filed March 14, 1906. Rehearing denied June 5, 1906. Transfer denied June 29, 1906.]

MASTER AND SERVANT.—*Railroads.*—*Ways, Works and Machinery.*—*Steel Punch.*—*Assumption of Risk.*—A servant, holding a steel punch, used until its head is burred and battered, while his fellow servant strikes it for the purpose of driving out an iron bolt, assumes the risk that small pieces of steel may fly therefrom and injure him, such defect being appreciated and being known by such servant.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Action by Claude E. Phinney against the Cincinnati, Hamilton & Dayton Railway Company. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. *Reversed.*

E. J. Jacoby, Theodore P. Davis and Miller, Elam & Fesler, for appellant.

Wymond J. Beckett and Elliott, Elliott & Littleton, for appellee.

BLACK, P. J.—The appellee was injured while in the performance of his duty as a machinist in the employ of the appellant at its machine-shop in Lima, Ohio, engaged,

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with the aid of a helper, in using a handle punch in removing a bolt from a smoke-arch on a locomotive engine, the injury being the destruction of one of the appellee's eyes, by being struck by a sliver or scale of iron which flew off the head or pole of the handle punch, which the appellee was holding by means of its wooden handle upon the bolt, while the punch was struck with a hammer by the helper. It was alleged in the complaint that the appellant neglected to keep the handle punch in proper repair, and in a reasonably safe condition to do the work it was intended to do, and for which it was used; that it was furnished by the appellant to the appellee through his helper, to drive out and remove bolts from the smoke-arch; that its pole or head, by long use, had become burred or split, and pounded down, spread out, rough and scaly; that the appellant knew its condition and, in the exercise of ordinary care, should have repaired and reformed the head of the punch, but it negligently permitted the punch to be used in its factory by said employees until its head had become battered, and was in the condition aforesaid, and also negligently failed to repair the punch and to put its head in proper condition and shape to make it safe and serviceable; that in the performance of his duty and in the line of his work, it was the appellee's duty to take hold of the handle of the punch, and to hold the punch against the bolt in the smoke-arch, and it was the duty of his helper to strike the punch with a hammer, and by that means to drive the bolt out of the smoke-arch; that the appellee placed the punch upon the bolt in a proper and careful manner, and his helper struck it in the usual way; that by reason of the unsafe, burred and negligent condition in which the punch head had been so left, the blow upon it by the helper "caused a sliver to fly off of the head of the hammer and into" appellee's eye, etc.; that the injury to his eye was caused by the negligence of the appellant, as aforesaid, in failing to keep said tool in proper and safe condition, and in furnishing the appellee with said

defective tool to perform his work as aforesaid; that he had no knowledge that the tool was defective as aforesaid, and in the exercise of ordinary care could not have discovered the defective and dangerous condition of the tool before the happening of the accident; that by reason of the negligence of the appellant the scale flew off of said punch and into the appellee's right eye, etc.

Some objections to the complaint are suggested by counsel, but we think it proper to pass to a consideration of the case upon its real merits, rather than to send the case back for a correction of the pleading, if it can be said to be defective, and thus to prolong unnecessarily a controversy over the facts, which sufficiently appear in the record.

With the general verdict in favor of the appellee the jury returned answers to interrogatories, whereby they found specially that the appellee was employed by the appellant from July 15, 1902, to March 24, 1903, as a machinist. At the time of his injury he had been engaged by the appellant in such capacity about seven months. At the time he was employed by the appellant he was a skilled mechanic in the line in which he was employed. He received his injury at 1:20 o'clock in the afternoon. The punch which he was using at the time he received his injury was not in the condition of punches in common use by railway companies in that line of work. As to whether the pole or head of the punch which he was using at the time he was injured was split when he first began to use it on the day on which he was injured, there was no evidence. The pole or head of this punch was rough and scaly when he began to use it on that day. The punch was in design, but not in character, such as was generally used in that line of work. The pole or head of the punch became burred from long usage prior to the time when he first obtained it on the day of his injury. A sliver of iron from the bolt which was being removed from the smoke-arch did not fly off and into his eye and cause his injury. The head or pole of the punch

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was pounded down and spread out when he first obtained it on the day of his injury. Before he was injured he could have seen the condition of the pole or head of the punch. A sliver of iron from the head or pole of the punch flew off and into his eye, causing his injury. The flying off of scales or small particles of iron is an ordinary occurrence or incident in the use of a handle punch, as the same was being used by the appellee when he was injured. There was no evidence as to whether, when scales or small particles of iron fly off in the process of driving out bolts from a smoke-arch, the direction in which they fly is affected by the position in which the operator holds the punch. When he received his injury the appellee was attempting to drive out a bolt from a smoke-arch. He was working with a helper. The appellee did not, but his helper did, strike the blow with a hammer upon the punch which the appellee was using at the time he received his injury. There was no evidence as to whether the condition of said punch was open and obvious at the time mentioned. When the head of a punch is burred, the striking of the same with a hammer is likely to cause a sliver of iron to fly off of the head of the punch. There was no evidence as to whether the condition of the punch was open and obvious to the appellee and his helper at the time mentioned. There was nothing to prevent the appellee from observing and ascertaining the condition of the head of the punch he was using. He had good eyesight prior to his injury. He had been employed fifteen years in the line of his work. He had worked in and about that place in that line of his work for the appellant seven months. He had been working with punches in doing the class of work in which he was engaged when he was injured about ten years. He examined the point of the punch before he was injured. The engine on which he was working when he was injured was backed into the shop on a track through an open door in the shop. There was no evidence as to whether this door was open at the time he was injured.

or as to whether there was anything between the appellee and the door at that time. He then was about ten feet from this door.

It is not claimed and does not appear that the handle punch was not properly made of suitable and sound materials and in proper shape, or that it was not such a punch in design and materials as was adapted to the proper performance of the work in which it was used. No failure on the part of the employer properly to inspect it to ascertain its insufficiency in any of these particulars was asserted, and in such respects it must be considered, for the purposes of the case, as a sufficient tool. The only fault charged to the appellant was that it had permitted the head of the punch to become battered down and burred by its proper use, wherein it was struck and pounded upon the head by hammers in driving out bolts, against the ends of which the point of the punch was held by the machinist while his helper did the striking with the hammer. It was not a broken or wholly worn out tool. It was not proved to have been split. The only fault attributed to it and found to exist was that scales or slivers of iron were liable to fly off from it when struck by the hammer. No negligence concerning the character of the tool or its adaptability, except in relation to this peculiar source of danger, was asserted as part of the cause of action. It was a common tool of the simplest character, there being nothing unknown, obscure, or uncertain in its materials, structure, or operation, or in its worn condition.

The appellee was a skilled mechanic in the line in which he was employed. He had been employed in the line of his work for fifteen years. He had been working with punches in doing the class of work in which he was engaged when injured about ten years, and had worked for appellant in and about the place where he was injured in the line of his work for seven months. He examined the point, which he placed upon the end of the bolt, which he and his helper

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were driving out by means of the punch and hammer. They were engaged in work which required them both to look at the punch. The appellee had good eyesight. There was nothing to prevent his observing and ascertaining the condition of the punch, and he could have seen its condition. The injury was caused by a sliver of iron flying off of the head of the punch when it was struck with the hammer by the helper. The striking of the head of a punch in its known condition was likely to cause such a sliver so to fly off. The flying off of scales or small particles of iron is an ordinary occurrence or incident in such use of a handle punch. The possibility or likelihood of such an ordinary occurrence in the work of such a skilled and experienced mechanic with such a tool must be regarded as creating one of the ordinary dangers of such service. The injury was an accident, resulting in some loss perhaps to the employer and in a great loss to the unfortunate employe, whom all must commiserate. The principles of law applicable to such a state of facts have been often announced and illustrated by references to cases and by the statement of distinction between the cases.

The liability of the employer cannot be made dependent wholly upon the size or the complicated or intricate nature of the instrument furnished by it to the employe, but if the instrument be a tool in common use in the employment, and be of such simple character as that here involved, and its actual condition and adaptability be necessarily known to the employe using it, and the danger incident to its use from which an injury occurs to an experienced adult employe be necessarily understood by such employe, the employer's responsibility should not extend to liability for such injury.

We cannot adopt the theory that there can be no recovery in favor of the employe injured by an instrument for work furnished him by his employer, through some quality or condition thereof adapted to produce the injury, whenever

the danger of injury is as well known to the employe as to the employer. This would not be in harmony with the accepted doctrine that a higher obligation of inspection rests upon the employer than upon the employe; but if the adult, experienced employe voluntarily uses such a tool as that in question in the case at bar, having all the understanding of the danger involved in its use that the employer has, and all that by proper inspection he would have, there is occasion for the application in the decision of such a case of the maxim *volenti non fit injuria*, or ground for characterizing the happening of the injury as an accident.

Judgment reversed, with instruction to sustain the appellant's motion for judgment upon the special findings of the jury.

BEDFORD QUARRIES COMPANY v. TURNER.

[No. 5,078. Filed March 7, 1906. Rehearing denied May 18, 1906. Transfer denied June 29, 1906.]

1. APPEAL AND ERROR.—*Complaint.*—*Paragraphs.*—*Judgment Resting on Good.*—Where a judgment appealed from affirmatively appears to rest on a good paragraph of a complaint, the overruling of a demurrer to a bad paragraph is not reversible error. p. 557.
2. PLEADING.—*Complaint.*—*Master and Servant.*—*Negligence.*—*Several Acts of.*—*Proof of One.*—Where the servant alleges several acts of negligence of the master in causing his injuries, proof of one of such acts is sufficient to support a judgment for plaintiff. p. 563.
3. TRIAL.—*Master and Servant.*—*Negligence.*—*Proximate Cause.*—*Interrogatories to Jury.*—An answer to an interrogatory to the jury, stating that plaintiff would not have received the injury complained of but for the defective condition of the derrick, shows such defect to be the proximate cause of the injury. p. 563.
4. MASTER AND SERVANT.—*Safe Place.*—*Promise to Repair.*—Where the master promised to repair the defective cogs in a derrick used in moving heavy stones at a quarry, and the servant, thinking and being assured by the master that such

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repairs were made, took his position and because of the non-repair of such cogs, a large stone fell, causing one of plaintiff's feet to be caught and crushed, the master is liable. p. 563.

5. **MASTER AND SERVANT.**—*Assumption of Risk.*—*Promise to Repair.*—Where the master promised the servant to repair the cogs in a derrick and afterwards assured the servant that such repairs were made, the servant does not assume the risks therefrom, where it is shown that such repairs were not made as promised. p. 565.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by James F. Turner against the Bedford Quarries Company. From a judgment on a verdict for plaintiff for \$2,400, defendant appeals. *Affirmed.*

Brooks & Brooks, F. M. Trissal, E. C. Ritsher and W. T. Abbott, for appellant.

East & East and McHenry Owen, for appellee.

WILEY, J.—Action by appellee to recover damages resulting to him through the alleged negligence of appellant. His complaint was in two paragraphs, to each of which a demurrer was overruled. Answer in denial, trial by jury, and general verdict for appellee, and with the general verdict the jury found specially by answering interrogatories submitted to it. Appellant's motions for judgment in its favor on the answers to interrogatories and for a new trial were overruled. All of the above specified rulings are assigned as errors.

The sufficiency of the first paragraph of complaint is not questioned in the briefs, but in view of the contention between opposing counsel as to which paragraph of complaint the judgment rests upon, it is important to state the facts relied upon in the first paragraph as to the acts of negligence alleged. It is therein alleged that appellee was in the employ of appellant, and that under such employment it was his duty to run and control a derrick used in lifting stones from one place and carrying them to another; that the derrick was out of repair in this, to wit, that the boxings and bearings in which worked a heavy upright metal rod, on

either side of which were small wheels, were greatly worn, old, defective, and unfitted for use; and said boxings and bearings would not hold said rod in position, but allowed said rod to become loose, and the play was so great in the boxings that said cogwheels, which worked in other cogwheels on each end of said rod, would not catch, but would permit the cogs to slip out of their places, and thus said derrick would become unmanageable and dangerous to operate when lifting heavy stones; that said cogwheels, by reason of being worn, would not catch on each other and hold, so that said derrick could be safely operated, unless the bearings and boxings were in good and proper condition; that said upright rod and cogwheels were attached to the base of the derrick and mast pole, and were used by operating a wheel connected therewith, called a bull wheel, and which latter wheel controlled the rotary motion of the derrick; that by the turning of the bull wheel the derrick could be turned around to the right or left, or stopped in any desired position, when the derrick was lifting stone or when empty. It is then averred that appellee reported the defective and dangerous condition, etc., of the derrick to appellant's superintendent, and that he promised appellee that, if he would continue to work with the derrick, he would have it repaired and placed in a safe and proper condition; that on the following day appellee again began to work with the derrick and found it defective, and again notified the foreman, and also notified him that unless it was repaired and placed in proper and safe condition he would not continue in defendant's employ; that he was thereafter informed by the appellant's assistant mechanic that said derrick had been repaired and was safe for use, and he thereupon continued using the same; that on the following day appellee was engaged in giving signals to one Yeskey, a servant of appellant, assigned to the duty of conveying signals to the person in charge of the power controlling the raising and lowering of the boom pole; that a large

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stone, weighing many tons, was attached to chains and ropes at the outward end of said boom pole, and was being raised and swung around by said derrick, in a north-westerly direction; that appellee signaled Yeskey for the powerman to stop the power, which signal Yeskey carelessly and negligently failed to convey; that thereupon appellee signaled and ordered the person in charge of the bull wheel to stop the derrick from turning around; that said last signal and order were obeyed, but on account of the worn and defective condition of the cogwheels, and the defective and dangerous condition of the bearings and boxings, and the fact that the upright rod or shaft would not hold its position, the cogwheels of the derrick slipped and would not catch; that the derrick, with a large stone attached, continued to swing rapidly toward appellee, and before he could make his escape he was injured "by the carelessness and negligence of said defendant as above charged, by reason of said large swinging stone striking another stone, causing it to break and separate, and one large, heavy piece of said swinging stone fell, striking the opposite end of another stone upon which this plaintiff's right foot was for the instant resting, in his flight away from said swinging stone and derrick, causing it suddenly to fly upward, catching plaintiff's right foot between it and another stone, thereby crushing said foot," etc. Another act of negligence alleged in this connection was appellant's retaining in its service said Yeskey, who was too young and inexperienced to perform the duties of his position, and who was wholly incompetent and negligent in the performance of his duties, being thirteen years of age, and incapable of realizing the importance of his position, and appellant well knowing of such facts and appellee being ignorant thereof.

In the second paragraph of complaint appellee sets out in full the duties he was called upon to perform by reason of his employment, and describes the manner in which heavy stones are lifted by dogs and chains attached to a

derrick, and removed from one place to another. It is then averred that stones that were sound and free from "dries" were reasonably safe to hitch to and lift; but if such stones being lifted had what were called "dry seams" in them, the lifting of said stones became more hazardous, for the reason that while being swung around the boom they were likely to separate, fall and injure appellee and other employes, and that if the stone had dry seams in it the place around, beneath, and near the stone was dangerous and unsafe in which to work, since the stone was likely to separate and fall upon and injure appellant's servants. It is then alleged that it was the duty of appellant to examine or cause to be examined the stones that were to be lifted, to ascertain whether they were free from "dries" and reasonably safe to lift; that on the day appellee was injured he was in the line of his duty, had the "dogs" placed in a large stone and attempted to lift the same for the purpose of moving it and placing it upon another lot of stones; that properly to place the stone that was being lifted it was appellee's duty to take his position at a point near which such stone would finally be placed, and there ease it down to a convenient resting place, and that while he was so situated, and without any knowledge on his part that the place where he was working was dangerous, and without any knowledge that the stone had a "dry" in it, or was likely to separate in being lifted, the stone when near appellee suddenly separated, and pieces of the same fell against appellee and on his foot, and thereby inflicted the injury of which he complains. It is then charged that appellee "received his injuries by reason of the carelessness and negligence of the defendant in this to wit: that it failed to furnish him a reasonably safe place to work; that it had placed the stone which caused his injuries at a point where he hitched to the same twenty-four hours prior to the time he received his injuries; that at the time it was placed, and at all times afterward until it caused the injuries to

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plaintiff, it contained what is known as a "dry" or "fine" seam which separated the stone wholly or partly from the bottom toward the top; that such seam was a fine division of the solid stone in whole or in part, and of such character that in lifting the same in the ordinary and usual manner the stone, while swinging in the air, was likely to separate at such seam, fall and injure or cause to be injured those near by; that defendant well knew that such seam existed in such stone, or with a reasonably close inspection could have known it long enough before plaintiff's injuries to prevent the same; that by a proper and reasonable inspection, although not visible to casual observation, the "dry" could have been discovered and plaintiff's injuries prevented. Plaintiff further alleges that defendant well knew that the lifting of said stones by means of dog and boom pole, heretofore described, would be dangerous to defendant's employes, and especially to this plaintiff; that appellant further knew, or by reasonable diligence could have known, that said stone while being lifted in the air would probably separate, fall and injure the plaintiff or other employes, and with all such knowledge it further negligently failed to notify the plaintiff of the defective condition of such stone, or that there was a "dry" seam in the same, or that it was likely to fall and injure him, or that the place in which he was working at the time was dangerous and unsafe; that said defendant well knew that said place was unsafe and dangerous, and plaintiff further alleges that he was ignorant of all such facts and received his injuries while he was in the line of his duty, etc.

As to the first paragraph of complaint appellant has not pointed out any objection.

Counsel for appellee contend that it affirmatively appears from the answers to interrogatories that the verdict and judgment rest upon the first para-

1. graph of complaint, while counsel for appellant affirm that they rest upon the second; also that as

the second paragraph is bad, the judgment cannot be upheld. If in fact the second paragraph is bad, and it affirmatively appears that the verdict and judgment rest upon it, a reversal will have to be ordered, for a bad paragraph of complaint will not support a judgment. If, on the other hand, it affirmatively appears that the judgment rests upon the first paragraph, even if the second is bad, the overruling of the demurrer to it was not reversible error. *Western Union Tel. Co. v. Henley* (1899), 23 Ind. App. 14; *Town of Rochester v. Bowers* (1899), 23 Ind. App. 291; *Lowry v. Downey* (1898), 150 Ind. 364; Elliott, App. Proc., §666. We will, therefore, first determine this question, and if it is determinable from the record, we must look to the interrogatories and answers for its solution.

The following facts, pertinent to the matter under consideration, are exhibited by the answers to interrogatories: The steam-power had nothing to do with turning the derrick, but was simply used to raise and lower the stone swung from the boom. Appellee was the derrick runner, and in charge of it and the men operating it. It was his duty to direct what stones to lift and move, as to how they were hooked, how high they were to be raised, and how far moved, and when to be let down. He was not responsible for the management of the derrick in handling stones. At the time of the accident the boxings and bearings on the upright rod on the shaft were worn, old, defective and unsuited for use, so that they would not hold the rod in perpendicular, but allowed it to become loose, so that the cogwheels on it would not catch, but would slip and get out of their places. The cogwheels were old and defective, and would not catch on each other. The derrick was turned solely by the efforts of the man on the platform operating the propeller, and could have been stopped solely by him if the derrick had been in order. The stone which was being moved, and which broke and injured appellee, did

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not strike any other stone or object until it had broken and fallen. It broke because of the "dry" or defect in it, and the breaking of the stone caused it to fall and inflict the injuries upon appellee. The entire operation of moving the stone, including the hooking of the dogs into it, was under the sole management and direction of the appellee. He was an experienced derrick runner and familiar with the duties of operating and managing a derrick. When the stone had been lifted, if appellee's signal had been transmitted by Yeskey to the power man he could not have stopped the derrick from turning. Appellee did not know of the defects in the derrick. He did not know the cogs would not mash, having been informed that the defects had been repaired. The boxings, after appellee complained that they were out of repair, had been repaired "temporarily," but such repairs were not sufficient. The boxings and bearings were not in good order, and the cogs on the small wheel and master wheel would not catch on each other. The stone was being moved at an unusual rate of speed, because the cogs were not mashing. The stone was raised to its entire height before the derrick and stone began to swing. Before appellee caused the stone to be lifted he looked at it to see if it was all right. It was the duty of the appellee to look out for the safety of himself and the other members of the derrick crew. It was not his duty to know that the stone was in proper condition or safe to lift. He gave the order or signal to lift the stone. When appellee was hooking the stone before it was lifted, he was close enough to see the "dry," if he had looked. He had daily been working as a derrick runner, and had been lifting and moving with the derrick stones with "dries" in them. When the stone was lifted and moved no one was present, other than appellee, to give orders and directions in regard thereto. It was his duty, if he saw anything wrong with the stone, not to lift it until he had notified the ledge foreman. The "dry" in the stone was not visible to

a person within two or three feet of it, and it did not show through the stone on bottom, top or sides. The stone broke at a "dry." When the stone was dragged appellee stood within a few feet of it and gave the signals and directions when the power was to pull and when not to pull, and such directions were given of his own volition and not by the orders of any one else. Before the stone was lifted appellee put one hook in the hole in one end and went to the other end. He was on the stone when he put the hook in one end, and walked on it to look at the other end. The stone had been dragged from the ledge about seventy-five feet to a place from which it was lifted on the day before by the derrick controlled by appellee. When he was hooking and preparing the stone for lifting he could have seen the "dry," if such "dry" had been visible. The jury found that the reason why appellee could not and did not see the "dry" was because it was not visible. The inspector, whose duty it was to inspect the stone, did not discover the "dry," nor did any one discover it before the accident. The inspector made the inspection in the usual and customary manner of making such inspections under like circumstances. The stone which was being lifted did not strike any other stone just at or before it fell. The stone contained a dry seam which made a division in the stone that was not discoverable by a casual observation. It would have required a close examination or inspection of the stone to ascertain the nature and extent of the dry seam.

Columbus Prow was in appellant's employ, and under such employment it was his duty to make inspection of stones to ascertain if they were safe to lift with a derrick. Appellee was under his direction, and bound to obey his orders. Prow inspected the stone that broke, and directed appellee to move it with the derrick, and he had full charge of appellee and the derrick crew at the time of the accident. The only authority that appellee had as derrick runner was to give signals for the operation of machinery when a stone

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was being lifted. Prow directed all the work done by appellee and the derrick crew, and pointed out to them the places to set the stones and what stones to lift. Appellee did not know that the stone he was lifting had a dry seam. The fact that the stone had a dry seam, by reason of which it was liable to separate and fall, made the place where appellee was working dangerous and unsafe. His working place was also rendered dangerous by reason of the fact that the derrick was unmanageable, and the rotary motion could not be stopped by the bull wheel, on account of its being out of repair, so that the cogs would not catch in the master wheel.

The following interrogatories and the answers thereto, which relate particularly to the question we are now considering, we give in full: "No. 83. Would not the plaintiff's injuries have been prevented, if the derrick had not been defective and out of repair, by James Mundy, the bull wheelman stopping the rotary motion of said derrick before the swinging stone reached the stack where plaintiff was working? A. Yes." "No. 95. Immediately on discovering that the boxing and cogs had become defective, did not the plaintiff, by signal, notify James Mundy to stop the boom from turning further, and did he not in a few seconds thereafter notify Yeskey to stop the power? A. Yes. No. 96. On signal from the plaintiff did not James Mundy immediately attempt to stop the movement of the boom from turning, and failed because of the defective condition of the cogs and boxing? A. Yes. No. 97. Did not the boom pole, because of the defective condition of the boxing and slipping of the cogs, go round westward and northward, gaining speed as it went, until the stone broke near where the plaintiff was standing; there breaking and dropping on another stone which tilted the north end upward, catching plaintiff's right foot and crushing it off? A. Yes. No. 98. Was not the defective condition of the cogs and boxing one of the direct causes of plaintiff's in-

jury? A. Yes. No. 99. If the cogs and boxings had been in proper and safe condition, would not James Mundy have been able to stop the boom before it reached the point where the stone separated and where plaintiff was standing? A. Yes."

Prior to the day of the accident appellee notified appellant's ledge foreman, Prow, that the boom pole of the derrick would not work because of defects in the boxings, and appellant, through its foreman, promised appellee if he would remain in its employ the defects would be repaired the next morning. This was on June 19, 1901, and the following morning some repairs were made on said boxing, and the assistant master mechanic, who made the repairs, stated that the defects were repaired all right, and told him to go ahead and work. Appellee relied on this statement, continued in appellant's employ, and until the time of his injury believed that the machinery was safe to work said boom. The jury also found that the boxing in which the staff turned again became defective when the boom was lifting the stone which injured appellee. The jury also found that appellee discovered that the stone was coming rapidly toward him, and that he quickly used all reasonable effort to avoid injury by running from it.

The effort made to repair the defects in the machinery was ineffective because the boxing still remained loose, and the cogs slipped at the time of plaintiff's injury. The jury also found that Yeskey was employed as a signal boy, had been there two or three days, but that appellant failed fully to instruct him as to his duties. He was only thirteen years old. He was inexperienced and incapable of acting as signal boy. Appellant knew these facts. At the time of the injury Yeskey had his face turned from the derrick runner, and he failed to convey the signal given to the power men. If Yeskey had conveyed the first signal the boom could have been stopped in lifting the stone to a point below the top of the pile on which it broke. One of

the causes that produced appellee's injury was Yeskey's failure so to convey such signal.

We have given all of the material facts specially found, so that we may determine whether they affirmatively show that the judgment rests upon the first paragraph of the complaint, and also whether appellant was entitled to judgment on the answers to interrogatories notwithstanding the general verdict.

It may be observed that several acts of negligence are alleged in the first paragraph, but we are inclined to the belief that appellee seeks to hold appellant responsible

2. because of defective machinery and the employment of an inexperienced and inefficient signal boy. It is true that it is averred that the stone that was being lifted had a dry seam in it; that it struck another stone, by which it was broken, resulting in the injury. It is asserted by counsel for appellant that as the jury found that the stone did not strike another stone before it broke, we are driven to the conclusion that it affirmatively appears that the judgment is based upon the second paragraph of the complaint. This does not necessarily nor logically follow. If the other acts of negligence were the moving and proximate causes of the injury, we may disregard the allegation of the complaint that the stone broke by striking another stone on account of there being a dry seam in it.

The jury specifically find that appellee would not have received his injury if it had not been for the defective condition of the derrick. If this be true, and we must

3. assume it as an established fact, such defective condition was the direct cause of the injury.

It is also further found that if Yeskey had properly conveyed the first signal given the boom would have been stopped below the top of the pile on which the stone

4. broke. It is further shown that two days prior to the accident appellee discovered the defects in the machinery, reported them to the proper authority, was as-

sured that repairs would be made if he would remain in appellant's service; and he relied upon such promises, and afterward was informed that such repairs had been made. It is found also that such repairs were insufficient, because they left the boxings and bearings in bad order; that the cogs would not mash, and that when appellee discovered his danger and gave the signal to stop the derrick boom it could have been stopped if the machinery had been in proper repair.

The facts exhibited by the answers to interrogatories establish every act of negligence alleged in the first paragraph, except that the cause of the breaking of the stone that was being lifted, was the fact that it struck another stone before it did break. The fact, however, that it did break is made manifest, and the fact that it broke without striking another stone first is not of material importance. All of these facts, considered together, clearly show that the verdict and judgment are based upon the first paragraph. Appellee was placed in a perilous position without any fault on his part. He appreciated the danger and made every reasonable attempt to avert its consequences. He was imperiled by reason of the fact that the machinery with which he was working was so defective that it could not be controlled, and he was lulled into a place of danger by an assurance on the part of appellant, through its authorized servant, that such machinery had been repaired and made safe.

Having reached the conclusion that the verdict and judgment are grounded on the first paragraph, it is unnecessary for us to determine the sufficiency of the second paragraph; for, if it is not sufficient, the overruling of the demurrer is not a reversible error.

The facts specially found support the general verdict as to all material matters, and hence appellant's motion for judgment on the answers to interrogatories was properly overruled.

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An examination of the evidence convinces us that it is ample to support the verdict and judgment.

The remaining question which counsel have discussed relates to the assumption of risk on the part of appellee.

Under the evidence and facts in this case, without

5. entering into a detailed discussion, we are clear that the doctrine of the assumption of risk on the part of an employe, which absolves a master from liability in case of injury, is not applicable here.

The judgment is affirmed.

WESTERN UNION TELEGRAPH COMPANY v. SEFRIT.

[No. 5,819. Filed October 3, 1906.]

1. **TELEGRAPHS AND TELEPHONES.—Messages.—Delivery.—Negligence.—Penalties.—Statutes.**—The negligent failure to deliver a telegraphic message renders a telegraph company liable for the payment of the penalty provided by the act of 1885 (Acts 1885, p. 151, §3, §5512 Burns 1901). *Western Union Tel. Co. v. Braxtan*, 165 Ind. 165, followed. p. 567.
2. **SAME.—Negligence.—Discrimination.—Statutes.**—A failure to deliver a dispatch as required by the act of 1852 (1 R. S. 1852, p. 481, §3, §5514 Burns 1901, §4178 R. S. 1881), providing that messages shall be delivered by messenger to persons residing within one mile of the station, upon payment of charges, is a failure to “transmit” such message as required by the act of 1885 (Acts 1885, p. 151, §1, §5511 Burns 1901), providing that messages shall be transmitted with impartiality. *Reese v. Western Union Tel. Co.*, 123 Ind. 294, followed. p. 567.
3. **SAME. — Messages.—Delivery.—Restrictions Upon.—Statutes.**—Telegraph companies are required by statute (§5514 Burns 1901, §4178 R. S. 1881, 1 R. S. 1852, p. 481, §3) to deliver, by messenger, messages to persons who live within one mile of the station or within the town or city where the station is located. p. 568.
4. **SAME. — Messages. — Delivery.—Statutes.**—Telegraph companies are required by the act of 1885 (Acts 1885, p. 151, §§1, 3, §§5511, 5512 Burns 1901) to deliver all messages which they undertake to transmit. p. 569.

5. STATUTES.—*In Pari Materia*.—*Construction*.—Statutes upon the same subject, passed at different times, are to be construed *in pari materia*, the latest to control in cases of conflict. p. 569.
6. TELEGRAPHS AND TELEPHONES.—*Messages*.—*Delivery*.—*Transients*.—*Statutes*.—The act of 1852 (1 R. S. 1852, p. 481, §3, §5514 Burns 1901, §4178 R. S. 1881) does not relieve a telegraph company from delivering a dispatch to a transient on an approaching train, when the message was addressed in care of such train's conductor, whom the operator knew and to whom he had ample opportunity to deliver such message. p. 569.
7. SAME. — *Messages*. — *Failure to Deliver*. — *Discrimination*. — *Penalties*.—A telegraph company which negligently fails to deliver a message to a transient on an approaching train, such message being addressed in care of the conductor thereof who was well known to the operator and to whom there was opportunity to deliver, is liable for the penalty provided under either the act of 1852 (1 R. S. 1852, p. 481, §2, 3, §5513, 5514 Burns 1901), providing for delivery of messages to persons residing within one mile of the station, or the act of 1885 (Acts 1885, p. 151, §1, 3, §5511, 5512 Burns 1901), providing against discrimination. p. 570.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Action by Charles G. Sefrit against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Chambers, Pickens, Moores & Davidson and *George H. Fearons*, for appellant.

Gardiner, Gardiner & Slimp, for appellee.

COMSTOCK, P. J.—Appellee recovered judgment against appellant in the Daviess Circuit Court for \$100, the penalty prescribed by the act of April 8, 1885, entitled "An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons," etc. Acts 1885, p. 151.

On August 26, 1904, plaintiff delivered to the defendant, at its office in Plainfield, a dispatch addressed to Lucian W. Wilder, care of conductor, Evansville & Indianapolis train No. 34, Petersburg, Indiana. The dispatch was transmitted at once. Upon receipt at Petersburg, the point of des-

tinuation, it was copied, enclosed in an envelope, and addressed to addressee, in care of said conductor, but through negligence was not delivered. Defendant's agent at Petersburg, after the dispatch reached said place on the same day, transacted business with said conductor at a time when he could have delivered the dispatch.

A demurrer to the complaint was overruled, and the cause put at issue by general denial. The court made a special finding of facts and stated conclusions of law

1. thereon, to which conclusions appellee excepted. In support of the appeal, appellant presents three points or propositions: (1) Having found the telegraph company negligent in its omission to deliver the dispatch, the court erred in its conclusion that the plaintiff was entitled to recover from the defendant the statutory penalty. A penalty may not be recovered for negligence. (2) Having found that the dispatch was transmitted to the point of destination without delay, but that the omission lay in the failure to deliver the dispatch to the addressee at the point of destination, the court erred in its conclusion of law, and the plaintiff was not entitled to recover the statutory penalty. Transmission under the penal section of the statute does not mean delivery. (3) The penalty is not recoverable where the addressee of the dispatch or his agent or the person in whose care the dispatch is addressed resides neither within one mile of the station to which the dispatch is addressed, nor within the town or city within which said station is.

The first and second of these points are decided adversely to appellant's claim in *Western Union Tel. Co. v. Braxton* (1905), 165 Ind. 165.

As to the third proposition, so much of the act of 1885, *supra*, as is pertinent, is as follows: "Every telegraph company with a line of wires wholly or partly within this

2. State, and engaged in doing a general telegraphic business, shall during the usual office hours receive

dispatches; whether from other telegraph lines or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for or manner or conditions of service between any of its patrons, but shall serve individuals," etc. Acts 1885, p. 151, §1, §5511 Burns 1901.

The Supreme Court in *Reese v. Western Union Tel. Co.* (1890), 123 Ind. 294, 7 L. R. A. 583, has held that a failure to deliver a dispatch in accordance with the requirements of section three of the act of 1852 (1 R. S. 1852, p. 481, §5514 Burns 1901, §4178 R. S. 1881) is a failure to transmit under the provisions of the act of 1885, *supra*, and renders the telegraph company thus guilty liable for the statutory penalty. Said section three is as follows: "Such companies shall deliver all dispatches, by a messenger, to the person, to whom the same are addressed, or to their agents, on payment of any charges due for the same: Provided, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is."

There is nothing in the act of 1885, *supra*, regulating the distance or prescribing the limits within which telegraph companies shall deliver messages. Section

3. three, *supra*, relates solely to the duties of telegraph companies as to the manner of delivering—"by messenger"—dispatches to addressees who reside, or whose agent resides, within the prescribed limits. The section relieves the company from delivery, by messenger, of telegrams to persons not residing within one mile of the telegraphic station or within the city or town within which said station is located.

The act of 1885 requires the delivery of all dispatches which the company undertakes to transmit. It is a rule

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of construction that a statute should be construed

4. as a whole so as most reasonably to accomplish its purpose. All consistent statutes which can stand together, though enacted at different times, relating to the same subject, are called statutes *in pari materia*, and

5. treated prospectively and construed together as though they constituted one act. They are made to operate, as far as possible, consistently with the evident intent of the latest enactment. 2 Lewis's Sutherland, Stat. Const. (2d ed.), §443, and cases cited in foot notes.

The intention of the legislature, manifest in both acts, was to secure the prompt and impartial delivery of messages. The provision of the act of 1852, *supra*, was

6. to relieve the telegraph company from the possible task of an unaided and perhaps fruitless search for an addressee, a stranger, through a wide territory. It could not have been the purpose to excuse the telegraph company from the discharge of its simple duty when it could perform it with but slight, if any, inconvenience.

The office of appellant was in the depot of said Evansville & Indianapolis Railroad Company, where said Evansville & Indianapolis train No. 34 regularly stopped, and where it stopped on said day. Appellant's agent Webb, and conductor Smith, of said train, were well acquainted and had been for a long time prior to August 26, 1904; and said Webb knew at that time that said train was designated as Evansville & Indianapolis train No. 34, and that said conductor and said addressee were acquainted with each other; and upon the arrival of said train said appellant's agent conversed and transacted business with said conductor, while said train was stopping at said station, but wholly failed to deliver said dispatch to him. Appellant cites two cases: *Western Union Tel. Co. v. Timmons* (1893), 93 Ga. 345, 20 S. E. 649; *Moore v. Western Union Tel. Co.* (1890), 87 Ga. 613, 13 S. E. 639.

Both cases are based upon a statute imposing a penalty

upon telegraph companies for failure to deliver messages to persons to whom they were addressed, who at the time resided within one mile of the telegraph office, or within the town or city within which the office is located. No other statute is referred to. In each case the court held that the nonresident could not recover. In the last-named case the plaintiff was a transient visitor. In the course of the opinion the court says: "If, after notifying the operator that he [the plaintiff] would be in Knoxville, and to send the message to him there, he had given him a definite address, such as a given street and number or the name of the owner of a particular house where the message should be delivered, perhaps he would have come within the spirit of the law, if not the letter of it." The facts bring the case before us within the spirit of the act of 1852, *supra*.

This message was not one to be delivered to a stranger. It appears from the findings that since the message was delivered by the plaintiff to the defendant for delivery

7. to the addressee, the defendant has received, transmitted and delivered other telegraph messages to other addressees at said town of Petersburg, some of whom resided within said town and within one mile of the telegraph station situated therein. The findings show that defendant was not free from impartiality, and was wholly lacking in diligence, and under either statute the company is liable.

Judgment affirmed.

FULLER v. EXCHANGE BANK ET AL.

[No. 5,695. Filed June 6, 1906. Rehearing denied October 4, 1906.]

1. PLEADING.—*Complaint.—Principal and Agent.—Receipt.—Authority of Agent.*—An allegation in a complaint that defendant bank, by its attorney, receipted for certain money, affirms the authority of such attorney to receipt for such bank. p. 572.

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2. **PLEADING.—Complaint.—Judicial Sales.—Purchase Price.—Inadequacy.—Presumptions.**—In order to set aside a judicial sale on the ground of the inadequacy of the purchase price, it is necessary to allege such fact, the presumption being that the property sold for its cash value. p. 572.
3. **OFFICERS.—Sheriffs.—Judicial Sales.—Payment.—Title.**—A sheriff, being a public officer whose powers are specially prescribed by statute, cannot pass title to property sold by him on execution, unless payment therefor is made to him in money. p. 572.
4. **SAME.—Sheriffs.—Judicial Sales.—Purchase by Execution Creditor.—Payment.**—A receipt by the execution creditor for the purchase price of the execution debtor's property, sold on execution by the sheriff, is a payment in money within the meaning of the law. p. 573.
5. **EXECUTION.—Payment.—Satisfaction.**—The receipt of the money from the execution debtor, or the sale of the debtor's property and receipt of the money therefor, by the sheriff, is a satisfaction of such execution and releases the debtor, regardless of what the sheriff does with the money. p. 573.

From Owen Circuit Court; *Joseph W. Williams*, Judge *pro tem*.

Suit by E. Chubb Fuller against Exchange Bank and others. From a decree for defendants, plaintiff appeals. *Reversed*.

A. W. Hatch, A. W. Wishard, Thomas G. Spangler and Charles Downing, for appellant.

Inman H. Fowler and John C. Robinson, for appellees.

ROBY, J.—Appellees' demurrer for want of facts to appellant's complaint was sustained, and, refusing to plead further, judgment was rendered against him, from which he appeals.

It is averred in the complaint, which is in one paragraph, that on June 23, 1904, the appellee bank recovered judgment in the Owen Circuit Court against appellant for \$575.92 and costs; that an execution was duly issued thereon and delivered to the sheriff, who on August 25, levied said execution "on 349 shares of stock at \$100 per share of the capital stock of the Epitomist Publishing Company as

the property of the plaintiff herein;" that the same was duly advertised for sale by said sheriff, who sold the same at public auction to appellees Smith and Nordyke for the sum of \$605.87, said amount being the highest and best bid offered; that after said property was sold, the appellee bank, by its attorney, receipted said sheriff on said execution for \$582.92, and said execution was afterward returned as satisfied. "Plaintiff avers that the amount of said bid * * * was not paid to the sheriff aforesaid by said defendants Smith and Nordyke at the time said sheriff made said sale, or at any time thereafter, nor was the amount of said bid paid by said sheriff to said Exchange Bank or its attorney * * * at the time the receipt aforesaid upon said writ was executed, nor at any other time. Wherefore plaintiff prays that said sale of said stock be vacated and set aside, for judgment for costs, and all other proper relief."

The averment is that the receipt referred to was

1. executed by the bank. The authority of the attorney to execute such receipt is thereby affirmed.

There is no averment that the amount paid was inadequate or less than the actual value of the stock described.

If the appellant desired to present a question as to

2. the inadequacy of the consideration, he should have done so by appropriate averment, the presumption being that property sold at a regular sale "fetches its true value." *DeHority v. Paxon* (1888), 115 Ind. 124.

The further question for decision is whether the failure to pay the amount of said bid invalidates the sale.

The sheriff is a special agent; he cannot exceed the power which the law gives him. That he cannot sell and convey

3. title to the property of another, except in accordance with such law, "is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a

power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court." *Thatcher v. Powell* (1821), 6 Wheat. 119, 5 L. Ed. 221. It follows that a conveyance made by him without receiving the purchase price is invalid. *Chapman v. Harwood* (1846), 8 Blackf. 82, 44 Am. Dec. 736; *Doe v. Collins* (1848), 1 Ind. 24; *Swope v. Ardery* (1854), 5 Ind. 213; *McCormick v. Walter A. Wood, etc., Co.* (1880), 72 Ind. 518; *Liggett v. Firestone* (1884), 96 Ind. 260, 265; *Ruckle v. Barbour* (1874), 48 Ind. 274; 2 Freeman, Executions (3d ed.), §301; Rorer, Judicial Sales (2d ed.), §729; Kleber, Void Judicial and Execution Sales, §18. No title to the property sold passes until the purchase price is paid. *Dawson v. Jackson* (1878), 62 Ind. 171; *Conklin v. Smith* (1855), 7 Ind. 107, 63 Am. Dec. 416. It is the payment of the purchase money which completes the sale. *Carnahan v. Yerkes* (1882), 87 Ind. 62, 66; *Liggett v. Firestone, supra*.

Where the execution creditor purchases, it is held that his receipt is sufficient without the actual payment of the purchase price by him to the sheriff, for the reason

4. that to require him to pay over the money to the sheriff, immediately thereafter receiving it back from the sheriff, would be an idle form. *Louden v. Ball* (1884), 93 Ind. 232, 234; *Boos v. Morgan* (1892), 130 Ind. 305, 311, 30 Am. St. 237; *Burton v. Ferguson* (1880), 69 Ind. 486; *Robertson v. Van Cleave* (1891), 129 Ind. 217, 15 L. R. A. 68; *Dean v. Phillips* (1861), 17 Ind. 406.

The reason for this exception from the universal rule requiring a cash payment of the amount bid, does not apply when the purchaser is not the execution creditor.

5. The cash payment satisfies the writ and judgment, the subsequent application of the proceeds of such

sale being a matter to which the debtor is not required to give any attention. *State, ex rel., v. Salyers* (1862), 19 Ind. 432; *Beard v. Millikan* (1879), 68 Ind. 231.

It is insisted by appellant that the attorney who executed the receipt averred to have been given by the appellee bank had no authority to act for the bank in that behalf. While the complaint does not present the point argued, it is suggestive of controversies likely to follow a holding that arrangements between the execution creditor and the purchaser, to which the execution debtor is not a party, may take the place of the cash payment by which the sale is consummated and without which no title passes.

The failure to pay the amount bid is not a mere irregularity, but is of the essence of the transaction, and the requirement that the amount of such bid be paid in cash is a material and essential one.

The judgment is therefore reversed, and cause remanded, with instructions to overrule the demurrer to appellant's complaint and for further consistent proceedings.

**LAKE ERIE & WESTERN RAILROAD COMPANY
v. HENNESSEY.**

[No. 5,519. Filed October 5, 1906.]

Pleading.—*Complaint.*—*Railroads.*—*Car Inspection.*—*Negligence.*—A complaint showing that transfer tracks were used by two railroad companies for switching cars from one to the other; that plaintiff, a car inspector, was required to inspect all cars set upon such tracks before 6 o'clock p. m. of each day; that defendant set some cars on one of such tracks and closed the switch; that defendant a short while afterwards switched a box-car with a defective brake upon such track and negligently opened such switch and such box-car struck the cars under which plaintiff was working, injuring plaintiff, is insufficient, since it shows that defendant had a right to use the track, and fails to show that it had any notice that plaintiff was under the cars at the time.

Lake Erie, etc., R. Co. v. Hennessey—38 Ind. App. 574.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by Alexander Hennessey against the Lake Erie & Western Railroad Company. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Reversed*.

Gregory, Silverburg & Lotz and *John B. Cockrum*, for appellant.

W. A. Thompson, W. H. Thompson, C. A. McGonagle and *J. Monroe Fitch*, for appellee.

ROBINSON, C. J.—Action for damages for personal injuries. Complaint in one paragraph; demurrer overruled; answer, general denial; trial, verdict for appellee, with answers to interrogatories. Appellant's motion for judgment on the answers and its motion for a new trial overruled. Judgment on the verdict. The rulings on the demurrer and on the motions for judgment and a new trial are assigned as errors.

The complaint avers that a transfer track connected the track operated by appellant and the track of the Chicago, Indiana & Eastern Railroad Company; that the transfer track was owned exclusively by the last-named road, and that after the construction of the transfer track it was used continuously for the transfer of cars and trains from one road to the other; that cars transferred remained upon the transfer track until the receiving party had time to and did inspect the same before taking them away; that each of the companies knew that all such transferred cars were so inspected; that on September 17, 1903, appellee was in the employ of the Chicago, Indiana & Eastern Railroad Company as a watchman and car inspector; that as such car inspector it was his duty to examine all cars set upon the transfer track by appellant to be received and shipped by the Chicago road, and that it was his duty to make such inspection of the cars placed upon such track each day before 6 o'clock p. m.; that in the proper discharge of his duties he was required to and did go and for a time re-

mained under the cars so inspected; that on the above date, at 5:30 o'clock p. m., appellant placed upon the transfer track four freight-cars, three of which were loaded and one empty, which were to be received and shipped by the Chicago road; that immediately after the cars were placed on the track appellant closed the switch so that no other cars could be placed on the transfer track until the switch should be first opened; that after the four cars had been placed on the transfer track by appellant it had no other cars "at said time that it (said defendant company) had any intention or purpose or right to set upon said track;" that thereupon appellee, in the discharge of his duty as such car inspector, proceeded to inspect such cars; that he knew appellant had no other car or cars to put on the transfer track during that day, and that the switch was closed; that when he went under the cars to inspect the same a heavily loaded coal-car, which had been transferred to appellant by the Chicago road, to be by appellant delivered to the consignee, was standing on appellant's track; that at the time appellant received the car the brakes on the same were out of repair, but in what respect appellee was not informed; that while appellee was under the cars inspecting the same appellant carelessly and negligently ran the coal-car north at the rate of twenty miles an hour, and negligently failed to repair the brakes, and negligently omitted to provide any means for stopping the car, and when the car approached the switch at the south end of the transfer track, and while the car was still running at such high speed, appellant carelessly and negligently opened the switch and ran the car on the transfer track and against the cars appellee was inspecting, and negligently failed to give appellee any warning that the car was approaching or of any danger; that when the car struck the cars appellee was inspecting, and under one of which he then was, the cars were started, striking appellee and injuring him; that he went under the cars for the purpose of inspecting the same; that he did not know appellant had or

would open the switch and throw the coal-car upon that track; that he had no notice or knowledge of the opening of the switch or of the approach of the coal-car, and that from the position he occupied under the car, inspecting the same, he could not see the approach of the car until it had struck the car under which he then was; that when the coal-car struck the cars he was unable to extricate himself before he was hurt.

Taking together all the averments of the complaint as to the uses made of the transfer track, it must be concluded that the pleading does not show that appellant had no right to use the transfer track at the time it did. Whether appellant had no purpose nor intention of putting any more cars on the track is not material, as it is not shown that appellee knew such purpose or intention and acted thereon. The car was placed on the transfer track about 5:30 o'clock p. m., and it must be held that the pleading shows that appellant had a right to place it on the transfer track at the time it did. The pleading does not show that there was any time in the day during which cars should be transferred, and the presumption, as against the pleader, is that the transfer might be made at any time, and that the coal-car was placed on the transfer track at a time when it was proper to do so. As far as disclosed, appellant's employes did not know that appellee was car inspector, or that he was there at the time to inspect cars, or that he was about the premises. In view of the particular facts averred, the averment that appellant had no right to put a car on the transfer track at the time it placed the coal-car thereon is no more than a conclusion.

Moreover, it appears that when the four cars had been placed on the transfer track appellee began immediately to inspect them, and while under the cars—how long after the four cars had been transferred does not appear—the coal-car was thrown against the cars he was inspecting. Even if the company did not, at the time appellee began inspect-

ing the cars, have "any intention" of placing other cars on the transfer track, it is not averred that appellee knew of such intention and was relying on it. It does not appear that appellee made any inquiry to ascertain whether appellant was going to use the transfer track after placing the four cars thereon. He knew the coal-car was on a track near the transfer track, and that it was at a time when other cars could rightfully be placed on the transfer track, and that there was nothing to prevent the placing of a car on that track at any time. He made no inquiries about the switching of any other cars, was not misled by anything that was said, and took no precautions whatever to let his presence under the car be known.

We think the pleading fails to show that appellant violated any duty it owed to appellee at the time the injury was inflicted. The demurrer to the complaint should have been sustained.

Judgment reversed.

WESTERN UNION TELEGRAPH COMPANY v.
McCLELLAND.

[No. 5,729. Filed October 5, 1906.]

1. **PLEADING.—Complaint.—Telegraphs and Telephones.—Messages.—Discrimination.**—A complaint against a telegraph company showing that it acted in bad faith, with negligence, partiality and discrimination, and neglected to transmit plaintiff's message in the order in which it was received, sufficiently shows a violation of the statute (§5511 Burns 1901, Acts 1885, p. 151, §1) requiring messages to be transmitted impartially. p. 583.
2. **SAME.—Complaint.—Telegraphs and Telephones.—Messages.—Wilful Failure to Transmit.—Negligence.**—A complaint to recover the penalty provided by statute (§5512 Burns 1901, Acts 1885, p. 151, §3) for failure to deliver a telegraph message, which alleges negligence and wilfulness as the cause of such failure, is sufficient, since a failure from either cause renders the company liable. p. 583.

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3. **PLEADING.—Duplicity.—Motion to Paragraph.—Striking Out.**—A motion to paragraph or strike out is the proper remedy for a complaint which is bad for duplicity. p. 583.
4. **TELEGRAPHS AND TELEPHONES.—Messages.—Duty to Transmit.**—It is the duty of a telegraph company under §5511 Burns 1901, Acts 1885, p. 151, §1, to transmit messages (1) impartially, (2) in their order as received and (3) without discrimination or conditions of service. p. 583.
5. **APPEAL AND ERROR.—Briefs.—Waiver.**—Failure to discuss an alleged error in the brief on appeal waives such error. p. 584.
6. **STATUTES.—Penalties.—Construction.**—Penal statutes are strictly construed, but the whole statute must be considered. p. 585.
7. **TELEGRAPHS AND TELEPHONES.—Messages.—Emergencies.**—A message in form: "Send wagons to Clayton for corpse. No. 43 goes over the Van," addressed to a bus man, shows on its face that an emergency exists to transmit it. p. 585.
8. **SAME.—Messages.—Transmission.—Overcharge.—Discrimination.**—An emergency message received at Indianapolis and not transmitted to its destination at Danville, 20 miles away, for two hours, and for which an excessive charge was paid, is, both in delay and overcharge, a violation of §5511 Burns 1901, Acts 1885, p. 151, §1, requiring messages to be transmitted without discrimination. p. 586.
9. **TRIAL.—Telegraphs and Telephones.—Failure to Transmit Messages.—Defense.—Burden of Proof.**—The burden is upon the telegraph company to prove that an apparently unreasonable delay in transmitting a telegram was caused by the transmission of other prior messages. p. 586.
10. **SAME.—Instructions.—Telegraphs and Telephones.—Failure to Transmit.**—An instruction, in an action to recover a penalty for the violation of §5511 Burns 1901, Acts 1885, p. 151, §1, that if plaintiff failed to show that defendant telegraph company set aside plaintiff's message and sent subsequently received messages ahead of it, the verdict should be for defendant, is erroneous. p. 586.
11. **EVIDENCE.—Failure to Produce When Within Party's Control.—Presumptions.**—Where a party fails to produce evidence peculiarly within his control, the presumption is that, if produced, such evidence would be against him. p. 587.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Charles F. McClelland against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Chambers, Pickens, Moores & Davidson, George H. Fearons and Otis E. Gulley, for appellant.

Thad. S. Adams, George W. Brill and George C. Harvey, for appellee.

WILEY, J.—Action by appellee to recover from appellant the statutory penalty for failure to transmit a telegraph message delivered to it.

The complaint, which is in a single paragraph, was held good as against a demurrer. Answer in denial, trial by jury, verdict and judgment in favor of appellee for \$100. Two questions are presented and discussed: (1) The complaint is insufficient; (2) the motion for a new trial was improperly overruled.

The complaint avers that appellee was a funeral director, and had been engaged to meet, in Indianapolis, a party from Asheville, North Carolina, take charge of a corpse, accompany it by train to Danville, Indiana, where appellee resided, and had his place of business, and convey the corpse to the home of the father of the deceased. It is averred that appellant owned and operated a telegraph line between Indianapolis and Danville, and was engaged, for hire, in receiving and transmitting by wire telegraph messages; that at both of said places appellant maintained public offices and places of business, for receiving and transmitting messages; that appellee had been requested and engaged to accompany said corpse from Indianapolis to Danville on what was known as train No. 43, on the "Big Four railroad," which was scheduled to arrive at the latter place shortly after midnight; that he had arranged to have all necessary conveyances at the station on the arrival of the train to convey the funeral party to the residence of the deceased's father; that just before the time for said train to leave for Danville he was notified that, on account of "washouts" on said railroad, trains could not run on it, and that it would be necessary to transfer said funeral party to the Vandalia train to be taken to Clayton, which

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is about six miles from Danville; that about 12:10 a. m. of March 20, 1904, before transferring said party to the Vandalia train, he delivered to appellant's agent and operator at its office and place of business in Indianapolis a written message, as follows:

"Union Station, Indianapolis, Indiana.

3-20-1904.

To McClelland's Bus Man,
Danville, Indiana.

Send wagons to Clayton for corpse. No. 43 goes
over the Van. Charles F. McClelland."

It is further averred that appellee then and there notified appellant's agent that the bus man to whom the message was addressed, and other persons, were then waiting at appellant's office and place of business at Danville, for orders and instructions as to what place they should meet appellee and said funeral party; that he then and there paid appellant's agent thirty-five cents, whereupon appellant undertook and agreed promptly to "transmit and deliver said message;" that appellee and said funeral party arrived at Clayton about 1 o'clock a. m. of said day; that they were compelled to wait and remain on the streets and platform, exposed to the inclement winter weather, for three hours, on account of the nonarrival of appellee's bus man with the necessary conveyances, etc. The complaint concludes with the following averment: "And plaintiff says that notwithstanding the aforesaid contract and agreement promptly to transmit and deliver the above message, and notwithstanding it was also its legal duty promptly and without delay to deliver said message, on account of its being an emergency message, as disclosed upon its face, said defendant, acting with bad faith, negligence, partiality and discrimination against this plaintiff failed and neglected to transmit and deliver said message in the order of time in which the same was received, and wilfully and purposely postponed the transmission and delivery of said message,

out of its order, for about three hours' time, during all of which time the plaintiff's bus man, to whom said message was addressed, and the friends and relatives awaiting the arrival of said funeral party, as aforesaid, were waiting in the defendant's office and place of business, in the town of Danville, Indiana, and in the immediate presence, and holding conversations with, the defendant's agent and operator. And that said defendant wrongfully, negligently, with partiality and discrimination, withheld said message for about three hours' time before delivering the same to the plaintiff's bus man, as aforesaid." The prayer of the complaint is that appellee have judgment for \$100, "the statutory penalty in such cases."

The action is based upon §§5511, 5512 Burns 1901, Acts 1885, p. 151, §§1, 3. The former section provides: "That every telegraph company with a line of wires wholly or partly in this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispatches, whether from * * * or individuals, and shall, upon the usual terms, transmit the same with impartiality and in good faith, and in the order of time they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or difference of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality." The latter section prescribes a penalty for violating the former.

Two objections are urged to the complaint: (1) It is insufficient because it failed to allege an omission to transmit the dispatch in the order of time in which it was received with reference to the receipt and transmission of other dispatches handled by appellant at the same office; (2) the complaint proceeds upon inconsistent theories, because it pleads a "wilful wrongdoing and negligence in the same paragraph."

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The first objection is not well grounded, for there is a positive averment that appellant acted with bad faith, negligence, partiality, and discrimination against ap-

1. pellee, and neglected to transmit and deliver the message "in the order of time in which the same was received, and * * * postponed the transmission and delivery of said message out of its order," etc.

As to the second objection, it is sufficient to say that the complaint does not proceed upon inconsistent theories, for the theory of the complaint is to recover a penalty

2. for appellant's violation of the duties laid upon it by statute. Whether it violated that duty by reason of wilfulness, discrimination, or negligence can make no difference. If the complaint is bad for duplicity, the way to remedy the defect is either by motion to strike out

3. or to separate the causes of action into paragraphs.

Rogers v. Smith (1861), 17 Ind. 323, 79 Am. Dec. 483; *Evans v. White* (1876), 53 Ind. 1; *Hendry v. Hendry* (1869), 32 Ind. 349; *Barnes v. Stevens* (1878), 62 Ind. 226.

In *Western Union Tel. Co. v. Ferguson* (1901), 157 Ind. 37, it was held that a breach of statutory duty results from the failure, whether intentional or otherwise, to transmit messages in the order of time in which they are received.

A telegraph company is required by the statute to receive and transmit dispatches: (1) With impartiality and good faith; (2) in the order of time in which they are

4. received; (3) without discrimination or conditions of service. The failure to discharge any of these duties subjects the company to the penalty in favor of the aggrieved party.

In *Western Union Tel. Co. v. Braxtan* (1905), 165 Ind. 165, it was held: "The suggestion that 'discrimination' and 'partiality,' as used in the statute, imply wilfulness and

positive wrongdoing on the part of the company, as grounds for the penalty, is without substance, because the failure to deliver a dispatch in the order of time in which it is received may occur from carelessness, as well as from wilfulness, and the consequences to the sender are precisely the same." The complaint charging a dereliction of a statutory duty, in the substantial language of the statute prescribing that duty, is not subject to the objections urged, and the demurrer to it was properly overruled.

By its motion for a new trial appellant presented a number of questions for the consideration of the trial court, but has waived its right to have many of them decided

5. on appeal by its failure to discuss them. The only questions presented by the motion and discussed by counsel are that the evidence is insufficient to support the verdict, and that the court erred in giving one instruction on its own motion and in refusing to give one tendered by appellant.

The point of contention on the part of appellant is that the evidence shows that the dispatch was delivered with reasonable promptness, and that the evidence fails to show that it was not delivered in the order of time in which it was received. The evidence shows that the message was delivered to appellant's agent and operator at the Union Station at Indianapolis a few minutes before midnight; that appellee explained to him its urgency, and told him his "bus man" would be at the station at Danville to receive it. The bus man was at the station at Danville at 12 o'clock, and waited there until about 2 o'clock, when the message was delivered to him. It took an hour to drive to Clayton. The operator at the Union Station had to send the message to the main office in Indianapolis, from whence it had to be transmitted to Danville. It was stipulated by the parties, as a part of the evidence, that the message sent from Indianapolis to Danville arrived at its destination

practically instantaneously after it was placed on the wire. Appellee testified that he paid appellant's agent at the Union Station thirty-five or thirty-eight cents for sending the message, and that after the agent handed him the change he "pushed the telegram off to one side and leaned back in his chair and picked up a paper or book or something." He also testified that he thought the agent was reading. The evidence further developed the fact that the regular rate for sending a message of ten words or less from Indianapolis to Danville was twenty-five cents, and two cents a word for each additional word. The telegram consisted of twelve words, and hence the regular rate would have been twenty-nine cents. Appellant's agent did not deny appellee's statement that he paid him thirty-five or thirty-eight cents for sending the message.

From these facts we must determine whether appellant is liable to appellee for the statutory penalty. This being a penal statute it must be construed strictly; but to

6. do this, as was held in *Western Union Tel. Co. v.*

Ferguson, supra, we are not required to "gaze fixedly upon a single phrase and be oblivious to the act as a whole.

* * * But, in construing it strictly, regard should be had for the clear letter of the statute."

The message which appears in the record was one of emergency, and it clearly appears so upon its face. Not only that, but appellant's receiving agent was advised

7. by appellee of that fact. As to messages of this class it was said in the syllabus to *Reese v. Western*

Union Tel. Co. (1890), 123 Ind. 294, 7 L. R. A. 583: "When the importance of a telegraph message appears on its face the company will be held to have notice of the urgency for its delivery, and to have contracted with reference to it. It is the duty of the company under such circumstances to make prompt and reasonable effort to deliver the message to the person to whom it was addressed, and failing to do so the company will be guilty of negligence."

The message was not delivered to the addressee for two hours after it was received by the company. It was urgent,

and the appellant was advised of that fact. The

8. evidence shows that the message would be received at Danville almost instantly from the time it was put upon the wires in Indianapolis, and that an excessive rate was charged and paid. This evidence sustains the verdict and judgment. The excessive charge, if nothing else, was a discrimination against appellee, under the statute. We think that the facts before us show an unreasonable delay in transmitting the dispatch.

This being true, it was not incumbent upon appellee to show, as contended by counsel for appellant, that other messages for Danville were received at the appellant's

9. Indianapolis office and forwarded before the one sent by him, for the law places that burden upon appellant. *Julian v. Western Union Tel. Co.* (1884), 98 Ind. 327.

The sixth instruction tendered by appellant and refused by the court was to the effect that if the evidence failed to show that appellee's message was set aside, and other

10. messages from Indianapolis to Danville, which were received after appellee's message, were forwarded or delivered before it, then the verdict should be for the defendant. This instruction does not correctly state the law, and was properly refused. See the following authorities: *Julian v. Western Union Tel. Co.*, *supra*; *Telegraph Co. v. Griswold* (1881), 37 Ohio St. 301, 41 Am. Rep. 500; *Bartlett v. Western Union Tel. Co.* (1873), 62 Me. 209, 16 Am. Rep. 437; *Baldwin v. United States Tel. Co.* (1871), 45 N. Y. 744, 6 Am. Rep. 165; *Turner v. Hawkeye Tel. Co.* (1875), 41 Iowa 458, 20 Am. Rep. 605; *Western Union Tel. Co. v. Meek* (1874), 49 Ind. 53.

The sixth instruction given by the court, to which appellant excepted, was as follows: "If a party to a suit has

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evidence peculiarly within his own knowledge and 11. does not produce it, the presumption is that if it were produced it would be against him. This rule of law applies alike to civil as well as criminal cases." This instruction correctly states an abstract proposition of law, and the objections urged against it are not well founded.

Judgment affirmed.

BUSH ET AL. v. BULLINGTON ET AL.

[No. 6,054. Filed October 5, 1906.]

PLEADING.—Complaint.—Ejectment.—"Or."—A complaint alleging that plaintiffs are the trustees of "the Christian Church, or Church of Christ" at a certain town, and as such are entitled to the possession of certain premises, and that defendants as trustees of "the Christian Church" at said town now hold possession of such premises without right, states a cause of action, there being nothing to show that by the use of "or" two churches were described.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Charles P. Bush and others against Charlie Bullington and others. From a judgment for defendants, plaintiffs appeal. *Reversed.*

Hottel, Cauble & Hottel and *Elliott & Houston*, for appellants.

Harvey Morris and *Mitchell & Mitchell*, for appellees.

ROBY, J.—The appellants' complaint was as follows: "The plaintiffs complain of the defendants, and for cause of action say: That they are the duly elected, qualified and acting trustees of the Christian Church, or Church of Christ, at the town of Fredericksburg, Washington county, Indiana, and as such they are the owners and are entitled to the possession of the following described real estate:

[Describing it]. That defendants, as trustees of the Christian Church at the town of Fredericksburg * * * now hold possession of said real estate without right. * * * Wherefore," etc. To this complaint a demurrer for want of facts was sustained. Plaintiffs declined to plead further, and appeal from the judgment thereupon rendered.

It is argued in support of the ruling that the complaint is bad for the reason that the disjunctive "or" shows that the plaintiffs are attempting to act as trustees for two churches, and that more than one church cannot be included within one corporation. There is nothing on the face of the complaint, or otherwise in the record, from which we are able to say that the appellants are not trustees, as they aver themselves to be, of the "Christian Church, or Church of Christ." The appellants aver themselves to be trustees of a church of one name, and the appellees to be trustees of a church of another name. The complaint conforms to the requirements, and the demurrer should have been overruled.

Judgment reversed, and cause remanded for further proceedings.

HOLLIDAY ET AL. v. PERRY ET AL.

[No. 5,697. Filed October 9, 1906.]

1. JURISDICTION.—*Parties.*—*Appearance.*—*Filing Demurrer.*—The filing of a demurrer by defendants constitutes a general appearance, and gives the court jurisdiction over the person. p. 594.
2. TRUSTS. — *Resulting.*—*Lands.*—*Grantees.*—*Payment of Purchase Money by Another.*—Under §3398 Burns 1901, §2976 R. S. 1881, a resulting trust may be created: (1) Where the grantee takes the legal title without the consent of the person paying the purchase money; (2) Where the grantee has taken the title, paying the purchase price, in violation of his trust, with money of another, and (3) where the grantee by agree-

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ment is to hold the legal title in trust for the person who pays all or a part of the purchase price. p. 596.

3. TRUSTS.—*Constructive.—How Created.*—Courts will declare a constructive trust where necessary in order to work out right and justice, regardless of the intention of the parties. p. 596.
4. PLEADING.—*Complaint.—Trusts.—Resulting.—Payment of Purchase Money.*—A complaint showing that defendant, by an agreement with plaintiffs, advanced, as a loan to them, their third of the purchase money for a tract of land, sufficiently shows payment thereof by the plaintiffs. p. 596.
5. TRUSTS.—*Fraud.—Refusal to Convey to Person Who Paid Purchase Money.*—The taking of the legal title by defendant to lands partly paid for by plaintiffs upon an agreement, free from fraud, subsequently to convey to them, becomes fraudulent upon his refusal so to convey. p. 597.
6. PLEADING.—*Complaint.—Contracts.—Written.—Oral Modifications.—Sales of Lands.—Vendor and Purchaser.*—A complaint showing a written contract by which defendant and plaintiffs agreed to purchase coal lands under certain conditions; that plaintiffs afterward orally agreed that defendant should advance their share of the money and take the legal title to the land and hold as security until payment; that plaintiffs offered to repay said sum but defendant refused to accept or to convey their interest, counts upon a contract in writing for the purchase of such land, the oral agreement as to payment being collateral. p. 597.
7. VENDOR AND PURCHASER.—*Contracts.—Discharge.—Real Estate.—Purchase Money.*—Where plaintiffs and defendant agreed in writing to buy lands, and plaintiffs borrowed from defendant their part of the money with which to pay for such lands, and such lands were so bought and paid for, such contract was fully performed, such borrowed money in legal effect being theirs. p. 597.
8. PLEADING.—*Complaint.—Theory.*—Every complaint must proceed upon a definite theory. p. 598.
9. SAME.—*Complaint.—Theory.—Trial.—Demurrer.—Appeal and Error.*—The theory of the complaint, acquiesced in by the parties on the trial below, will govern on appeal; but on demurrer for want of facts, a complaint will be held good on appeal if the facts show a cause of action on any theory. p. 598.
10. SAME.—*Complaint.—Facts.—Want of Theory.*—A demurrer to a complaint does not lie because of a want of a theory, but for want of sufficient facts. p. 598.

11. PLEADING.—*Complaint.*—*Fraud.*—*Averments of.*—*Facts.*—Averments of fraud are unnecessary in a complaint where the facts stated show actual or constructive fraud. p. 598.
12. FRAUDS, STATUTE OF.—*Use of.*—*Perpetration of Fraud.*—The statute of frauds cannot be used for the perpetration of a fraud. p. 599.
13. EVIDENCE.—*Fraud.*—*Frauds, Statute of.*—*Equity.*—Where fraud is involved in an equity case evidence will be admitted which the statute of frauds by its terms would exclude, in order to prevent a misappropriation of property. p. 599.
14. TRUSTS.—*Resulting.*—*Accounting.*—*Coal Mines.*—Where defendant fraudulently retained the legal title to, and operated coal mines belonging partly to plaintiffs, and refused to account, or to give an inspection of the books, he may be compelled by a court of equity to account to them for their interests therein. p. 599.

From Parke Circuit Court; *A. F. White*, Judge.

Suit by Elias S. Holliday and another against Henry W. Perry and another. From a decree for defendants, plaintiffs appeal. *Reversed.*

George A. Knight, J. M. Johns, Howard Maxwell and Rawley & Hutchison, for appellants.

Puett & McFaddin and G. S. Payne, for appellees.

COMSTOCK, P. J.—The complaint is in one paragraph and alleges that some time prior to January 11, 1896, the defendant Henry W. Perry proposed to the plaintiffs, who were engaged in the practice of law, that if they would prepare and assist him in taking options for the sale or leasing of certain coal and mineral lands in Parke county, Indiana, he would procure said lands to be drilled or otherwise tested for coal and minerals, and if any part of said lands or the coal under said lands was purchased said plaintiffs were to have a one-third interest therein, and said Perry was to have the remaining two-thirds; that plaintiffs accepted said proposition, and prepared and caused to be printed a large number of blank options; that

Perry had an extensive experience in the discovery of coal and in coal mining operations, and represented to these plaintiffs that he knew of a large quantity of land in Parke county which he believed was underlaid with coal, and upon which options for the purchase thereof could be obtained; that afterwards said Perry and plaintiff Byrd went over the territory selected by Perry upon which options were to be procured, and thereafter plaintiffs began the work of securing said options; that they were engaged in said work for more than a year, and spent a large amount of labor, time, and money in procuring options upon about two thousand acres of land; that before all said options were taken said plaintiffs and said defendant Perry, entered into a written contract, a copy of which is filed herewith as 'exhibit A,' and which contract is as follows:

"This contract by and between Henry W. Perry, party of the first part, and E. S. Holliday and George A. Byrd, composing the firm of Holliday & Byrd, party of the second part, witnesseth:

Whereas, said parties have been and still are engaged in taking options upon coal located under certain lands in Parke county, Indiana, all of said parties contributing their time and skill in procuring said options; and, whereas, for convenience, all such options are taken in the name of Henry W. Perry. Now in consideration of the services rendered and to be rendered by said Holliday & Byrd and the further consideration hereinafter stated, it is hereby contracted and agreed that said first party shall furnish two-thirds of all the money necessary to drill said lands and purchase the coal thereunder, and to defray all other expenses connected with fully carrying out the purpose of taking such options; and said party shall furnish the remaining third. It is further agreed that when deeds are taken to such lands, they shall be so drawn as to vest the title to all the coal purchased, two-thirds in said first party and one-third in such second party. It is further agreed that all the profits arising from and growing out of such business of taking options shall be divided in the

proportion of two-thirds to the first party and one-third to the second party, and whatever losses accrue shall be borne in the same proportion.

HENRY W. PERRY.

E. S. HOLLIDAY.

GEORGE A. BYRD."

That after they had procured the options provided for therein and tested the coal, finding that 240 acres was coal land, and the balance not, appellants found that they did not have sufficient money on hand to pay their one-third of the cost of drilling said lands and one-third of the purchase price of said 240 acres, which it had been decided to purchase, and that they would have to borrow money to meet the same, which they could and would have done from persons other than said Henry W. Perry, had not said Henry W. Perry agreed to loan and advance to them the sum needed; that they orally agreed with appellee Henry W. Perry to the modification of the written contract as follows:

"Said Henry W. Perry agrees to loan to them, advance and pay for them, the cost of drilling said land and the purchase price of all lands bought. He shall take the deeds for the lands purchased, in his own name, and hold the plaintiffs' one-third interest therein, as security for the money so loaned to and advanced for plaintiffs, with interest thereon at six per cent per annum. As soon as any one can be found who will lease the land, or lease and mine the coal in said land, said Henry W. Perry is to execute proper leases in his own name and hold one-third interest in any such lease or leases, in trust for plaintiffs. Whenever he collects a sufficient amount of royalty from the lands and the coal mined in said lands, to reimburse him for the money so loaned to and advanced for plaintiffs, or whenever plaintiffs pay him said sum or the balance thereof remaining due him, then said defendant Henry W. Perry agrees to assign a one-third interest in any and all said leases to the plaintiffs, and to convey and deed to them a one-third interest in said lands and coal."

That in pursuance of the terms of said written contract and the oral modifications thereof, as above set out, the parties hereto purchased, under said options, etc. They allege that under these contracts, the written one and parol modification, appellee Henry W. Perry took title to the lands, paid all expenses and the purchase price, entered into possession of the same, leased, rented and operated this land as his own, and has refused to account to appellants for the rents and profits of the coal leased on royalty, or to permit appellants to examine the books, and has generally exercised all the acts of ownership.

It is alleged that the parties purchased under said options certain described pieces of real estate; that said defendant Henry W. Perry leased said lands to Walter Ringo & Co. and to other persons and corporations to these plaintiffs unknown, for the purpose of mining coal thereunder; that said lessees sunk a shaft on said lands and have been continuously, for more than three years last past, mining the coal in and from said lands and paying to said defendant the entire royalty therefor; that said defendants conceal from these plaintiffs the amount of royalty so received under said leases, and refuse to give them any information concerning them; that said lessees, claiming to be under the instructions of said defendant Perry, refuse to inform these plaintiffs how much royalty they have paid said defendants on coal mined, although said plaintiffs have demanded of them such information; that defendant Perry refuses to account to them for one-third of said rent and royalty and refuses to give them information on the subject; that they have no means of ascertaining the amount of said rent and royalty, or what amount, if any, is due said Henry W. Perry, and are without any adequate remedy at law to compel said defendant to account therefor; that they have never received any compensation or reimbursement for the time, labor and money expended in and about the taking of said options as aforesaid; that they are ready and willing

to pay to said Perry any sum that may be due from them as provided in said contract, over and above one-third of the royalty which he has received, upon a proper accounting by him of the amount so received by him; that before the commencement of the suit plaintiffs demanded an accounting and offered to pay said defendant Perry whatever sum remained due from them as aforesaid, and demanded that he execute to them a deed for one-third of said lands and coal and an assignment of a one-third interest in said leases, but he refused and still refuses to comply with such request; that they are ready and willing to pay to said Henry W. Perry, upon the order of the court, any balance that may be due from them as aforesaid, after an accounting for a one-third of said royalties so received by him. They believe and aver the facts to be, that said Perry has received a sum largely in excess of any amount they owe as aforesaid; that said defendant Perry holds the title to said one-third of said land and coal in trust for them, as security for his advances as aforesaid made, and that said Emma Perry is his wife. Plaintiffs demand that Perry be compelled to account to them, and if, upon said accounting, there should be found to be due these plaintiffs any sum in excess of the amount found due said defendant Perry, they demand judgment against him therefor, and that said defendant be required to reconvey one-third of said real estate, land and coal, and to assign a one-third interest in said leases to plaintiffs, or, upon a failure to do so, that a commissioner be appointed to make such conveyance and assignments, etc.

Joint and several demurrers filed to the complaint—first, upon the ground that the court did not have jurisdiction of the person of either of the defendants,

1. and, second, that the complaint did not state facts sufficient to constitute a cause of action—were sustained. Plaintiffs failing to plead further, judgment was rendered against them for costs. The ruling of the court upon de-

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murrers is assigned as error. The filing of the demurrer by appellees constituted their appearance. 2 Elliott, Gen. Prac., §472, and cases cited.

The position of appellants is "that the complaint proceeds on the theory of a trust by implication of law; that is, that the court will imply or raise a trust from the facts alleged and enforce the same, notwithstanding the parol declaration, to prevent the appellees from applying the property held by them in trust to a purpose different from that for which they undertook to hold it, and thus to prevent injustice and fraud." Appellee Henry W. Perry contends that the complaint proceeds upon the theory that the deeds to him vested in him the title to the lands in controversy, charged with a verbal trust as to one-third thereof for appellants, to be conveyed to them under certain conditions. Section 3391 Burns 1901, §2969 R. S. 1881, in effect says that a trust in lands may be created by parol. Section 3396 Burns 1901, §2974 R. S. 1881, reads: "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." The next section (3397 Burns 1901, §2975 R. S. 1881) states the effect of such conveyance as against the creditors of the person paying the consideration therefor, and is not relevant to the section before us. Section 3398 Burns 1901, §2976 R. S. 1881, reads: "The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in violation of some trust, shall have purchased the land with moneys not his own; or where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the

land or some interest therein in trust for the party paying the purchase money or some part thereof."

An implied or resulting trust, under the statute, is created, (1) where a conveyance is taken in the name of the alienee without the consent of the party paying the

2. purchase money; (2) when the alienee, in violation of some trust, has purchased the estate with money not his own; (3) when, by agreement, the party to whom the conveyance was made was to hold the amount in trust for the party paying the purchase money or some part thereof. It appears from the complaint that the legal title was not acquired fraudulently or in violation of any fiduciary duty; but it appears that a certain beneficial interest was not to go with the legal title to appellee. "Con-

structive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title." 1 Pomeroy, Eq. Jurisp. (3d ed.), §155.

In the case before us the trust must apply to the third class. It is the claim of appellee that the complaint is insufficient under this class, because there is neither averment nor pretense that appellants paid any part of the purchase money, nor that appellee, by agreement without fraudulent intent, received the conveyance to hold the land in trust for appellants; and, further, that the demurrer to the complaint was properly sustained, because the contract, upon which it is based, is a parol contract—being partly in writing and partly in parol—and unenforceable under the statute of frauds, because it is a contract for the sale of lands.

The first of the foregoing objections is not warranted by the averments of the complaint. It alleges facts showing a valuable consideration for the consent of ap-

4. pellants to placing the title of the land in said appellee before the conveyance and in legal effect

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the payment of one-third of the purchase money.

The fact that the transaction was without

5. fraud in its inception, did not prevent its becoming fraudulent upon the subsequent refusal of Perry to perform his part of the agreement. 2 Washburn, Real Prop. (5th ed.), p. 520; 1 Pomeroy, Eq. Jurisp., §155; *Ransdel v. Moore* (1899), 153 Ind. 393, 408, 53 L. R. A. 753.

Admitting, only for the purposes of argument, that the suit is brought upon a contract for the sale of land, we must still hold that the contract for that purpose is in

6. writing. The written contract was complete, and the end for which it had been entered into was accomplished. The subsequent, parol agreement extended the time for payment of the sum to be furnished by appellants' giving to appellee security for the money loaned and advanced by Perry to appellants. In short, it simply provided for the manner of payment and how the money was to be furnished. When appellee Perry loaned to

7. appellants the sum necessary to pay one-third, the contract was as completely performed by them as if they had borrowed the money of a third party, instead of Perry, and paid the same to him. The money thus advanced was the money of appellants. Appellants did not lose their rights under the written contract by permitting appellee Perry to take title in his own name to the entire land. Appellee Perry's interests were not changed, nor his title affected by the promise which he made to appellants, and which they accepted and relied upon. Had the contract been carried out by the manual payment of one-third of the value of the land in money, instead of its payment by the loan, it would have been no more a payment, so far as fixing the rights of the parties, than under the agreement stated in the complaint. Had appellee Perry taken title to the whole of the land without the consent of appellants, he could not by so doing have deprived them of

their one-third interest, nor can he by taking title with their consent, when for a valuable consideration, which is clearly shown, he promised to hold the same in trust. The complaint is sufficient to withstand the demurrer upon other grounds. The facts alleged show actionable fraud by Perry.

Every complaint must proceed upon a definite theory. *Cleveland, etc., R. Co. v. Dugan* (1898), 18 Ind. App.

435, and cases cited; *Allen v. Woodruff* (1880), 96

8. Ill. 11; *Geney v. Maynard* (1880), 44 Mich. 578, 7 N. W. 173.

The rule adopted by the trial court, with the acquiescence of the parties, when a trial is had, will govern in the Appellate Court for the purpose of review; but on a

9. demurrer for want of facts the pleading will be sustained if it is good on any theory. *Kneales v. Price* (1886), 21 Mo. App. 295; *Darrah v. Boyce* (1886), 62 Mich. 480, 486, 29 N. W. 102; *Bennett v. Preston* (1861), 17 Ind. 291; *Culbertson v. Munson* (1886), 104 Ind. 451; *Yorn v. Bracken* (1899), 153 Ind. 492.

The want of a theory in a complaint does not make it ground for demurrer; "but the want of sufficient facts is the only defect in that direction which the statute

10. makes a ground for demurrer." *Scott v. Cleveland, etc., R. Co.* (1896), 144 Ind. 125, 32 L. R. A. 154.

If the facts alleged show fraud, either actual or constructive, no positive averments of fraud are necessary.

"Fraud indeed, in the sense of a court of equity,

11. properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case ex-

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actly as if the acts had been done." 1 Story, Eq. Jurisp. (13th ed.), §187.

It is a general principle, running through the decisions, that the statute of frauds will not lend its aid to the commission of fraud, having been enacted for the pur-

12. pose of preventing fraud, it will not be made the instrument for shielding, protecting, or aiding the party who relies upon it, in the perpetuation of a fraud or in the consummation of a fraudulent scheme. 2 Pomeroy, Eq. Jurisp. (3d ed.), §921.

So pronounced is the principle, that it has been repeatedly held that where fraud is involved a court of chancery will admit evidence which the statute would in

13. terms exclude, in order to prevent a misappropriation of property. *Catalani v. Catalani* (1890), 124 Ind. 54, 19 Am. St. 73; *Ransdel v. Moore*, *supra*.

Appellee Perry has used the property thus acquired, under the facts as averred, with great profit, and has refused to recognize in any way any rights or interest

14. of appellants growing out of the enterprise; has refused not only to convey to them any interest, but to render any account to them of the business growing out of the transaction. However honest may have been the purpose of appellee Perry in entering into the contract, his subsequent conduct in appropriating to his own use and advantage the time, labor and money of appellants, in violation of his agreement as charged (and of course we are now passing only upon the pleadings, and not the evidence), clearly shows bad faith, an appropriation of appellants' property in direct violation of an agreement made for a valuable consideration, exhibiting such facts as constitute, by whatever name it may be called, a trust in favor of appellants. Other objections made to the complaint cannot be sustained. Counsel upon both sides have submitted to the court briefs citing many cases and showing much research. We have given the cases cited due consideration

without referring to many of them in this opinion. Appellants are entitled at least to an accounting.

Judgment reversed, and cause remanded, with instructions to overrule appellee Perry's demurrers to the complaint.

CONCURRING OPINION.

ROBY, J.—The facts stated in the complaint, given the most favorable possible construction in appellee Perry's favor, show him to hold title to real estate as security for a loan. The conveyance to him by virtue of a contract between appellants and himself, under which appellants were entitled to such conveyance, does not put him in any different position than he would occupy if appellants had taken the conveyance to themselves, and thereafter made a mortgage in the form of a deed upon it. That a conveyance of land, absolute in form, may, as between parties, be shown to be a mortgage, is well established.

NATIONAL FIRE PROOFING COMPANY v. ROPER, BY NEXT FRIEND.

[No. 5,499. Filed March 28, 1906. Rehearing denied June 20, 1906. Transfer denied October 9, 1906.]

1. MASTER AND SERVANT.—*Factory Act.*—*Dangerous Machinery.*—An unguarded hole in a floor with rollers and knives beneath so arranged as to cut and grind clay and other materials dumped therein by the servants in the manufacture of tiling is not an appliance or machine within the meaning of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) providing that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description" shall be properly guarded. p. 604.
2. PLEADING.—*Complaint.*—*Master and Servant.*—*Factory Act.*—*Dangerous Machinery.*—*Guarding.*—A complaint in an action by a servant for injuries caused by the master's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) in

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failing to guard dangerous machinery, must show affirmatively that such machinery was capable of being guarded without rendering it useless for its intended work. p. 606.

3. PLEADING. — *Complaint.* — *Allegations.* — *Inferences.* — A complaint, when questioned by demurrer, must allege the necessary facts directly, mere inferences or probabilities based upon conjectures being insufficient. p. 606.

4. APPEAL AND ERROR. — *Reversal.* — *Questions Decided.* — Where the appellee's complaint is bad, and the judgment is reversed therefor, the Appellate Court need not decide other questions presented. p. 607.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Phillip E. Roper, by his next friend, against the National Fire Proofing Company. From a judgment on a verdict for plaintiff for \$4,000, defendant appeals. *Reversed.*

John B. Peterson, for appellant.

N. L. Agnew and Baker & Daniels, for appellee.

BLACK, J.—The appellee, a minor, by his next friend, brought his action against the appellant, the complaint containing two paragraphs, a demurrer to each of which, for want of sufficient facts, was overruled.

In the first paragraph, after introductory matter, it was alleged, that the appellant was a corporation engaged in manufacturing tiling and material for building purposes, and had its factory and place of business in Lake county, Indiana; that June 13, 1903, the appellee was in the employ of the appellant as a laborer in its factory; that while so employed he was ordered and directed by the appellant to wheel dry dirt in a wheelbarrow from one end of a certain large, second-story room, belonging to and being a part of appellant's factory, to the opposite end thereof, and to unload the dirt at a place on that floor where there was a square opening in the floor; that immediately below and in this opening, but concealed from view, was certain machinery belonging to the appellant's factory, and a part

thereof, consisting of an arrangement of rollers and knives, which revolved at a high rate of speed, the purpose and use of which was to mix sawdust, damp clay, and dry dirt to the proper proportions and consistency for moulding into shape for tiling and building material; that sawdust, damp clay, and dry dirt were dumped on the floor over and around the square opening in the floor and thence were thrown into the opening in the proper proportion and quantities to be mixed and reduced to the proper consistency by the rollers, knives and machinery immediately beneath the opening; that the opening and the machinery were not in any way guarded or protected by any railing or fenders, or in any manner whatever, "as it was by law the duty of the defendant to do, but the opening was entirely unguarded, and was therefore dangerous to those approaching it;" that the floor around the opening was damp and slippery; that as the appellee was unloading the dry dirt and clay from his wheelbarrow, in the course of his employment and in the line of his duty in the service and employment of the appellant as aforesaid, he necessarily approached near the opening in the floor, and thereupon he slipped upon the damp and slippery floor, and, by reason of the unguarded condition of the opening and the machinery therein, he fell into the opening and machinery, so that his left foot and leg were thrust into the opening and into the rapidly revolving machinery, rollers, and knives, and were immediately and entirely torn and cut in such a manner that it thereby became and was necessary to amputate his left leg at a place about half way between the foot and the knee, etc. It was further alleged that the appellee would not have been so injured but for said unguarded and unlawful condition of said opening and machinery, etc.

The only difference between the first paragraph and the second was that in the latter it was alleged that the opening

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and machinery were by the appellant "carelessly and negligently" left open and entirely unguarded, and it was stated that by reason of the "carelessness and negligence of the defendant in so leaving said opening and machinery open and unguarded" the appellee fell into, etc., and that appellee's foot and leg by reason of "said careless and negligent omission of defendant" were immediately and entirely cut off, etc., and that he would not have been so injured but for "said careless and negligent omission of defendant," etc.

In section nine of a statute of 1899, concerning labor, and providing means for protecting the liberty, safety, and health of laborers, etc. (Acts 1899, p. 231, §7087i Burns 1901), there is a requirement that in manufacturing, etc., establishments, "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws and machinery of every description therein shall be properly guarded," and by section twenty-five (§7087y Burns 1901) the violation of any of the provisions of the act or omission to comply therewith is made a misdemeanor, and punishment therefor is prescribed.

Counsel for appellant, claiming that the action is based upon a pretended right of recovery upon the common-law liability of a master to respond in damages to the injured servant for neglect of duty in failing to furnish a safe place in which to work, insists that each paragraph is lacking in allegations necessary in such an action. On the other hand, the appellee, not claiming the pleading to be sufficient at common law, insists that each paragraph sufficiently stated a cause of action under the statute above mentioned.

Passing over suggestions as to the want of directness in the allegations of facts, we will confine our attention to two matters which seem, in view of the decisions of our courts, to be of essential importance.

One of these matters has relation to the character of the appliances, because of the unguarded condition of which the

appellee was injured; the other, to the question

1. whether it is necessary in a complaint under this statute to show affirmatively the practicability of guarding the machine or appliance in question without unduly interfering with its usefulness for the purpose for which it is intended in the business.

In *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 58 L. R. A. 944, a complaint under this statute, which did not contain any averments upon the subject of the practicability of guarding the saw there in question, was held sufficient. It does not directly appear whether the attention of the court was given to this subject, the opinion being devoted to another matter. See *Muncie Pulp Co. v. Hacker* (1906), 37 Ind. App. 194.

In *Green v. American Car, etc., Co.* (1904), 163 Ind. 135, an appliance or machine not of any of the particular kinds or classes specifically mentioned in the statute was treated as within the remedial purpose of the legislature, as being covered by the general provision relating to machinery of every description, following the specific mention of particular kinds of appliances and machinery in the section under consideration.

Since the case at bar was before the court below, a decision has been rendered which seems to require us to hold the complaint before us insufficient. In *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, where the unguarded thing was an emery-belt, used by the defendant for polishing and finishing metal parts of certain articles manufactured by the defendant, it was said: "It will be noted that the machine or appliance denominated an 'emery-belt' in the paragraph is not one of the particularly enumerated or designated pieces of machinery or appliances required to be properly guarded. It does not come within the term or word 'belting,' as employed in the statute. * * * The general phrase, 'and machinery of every description therein,' under a well-recognized canon of construction appli-

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cable to the interpretation of statutes, must be held to be limited and qualified by the specific designation of the machinery or appliance which immediately precedes it. * * * There being nothing in the statute in question to indicate to the contrary, the general phrase, namely, 'and machinery of every description therein,' must, under the rule stated, be construed as meaning and including machinery or appliances belonging to or of the class or character designated as 'vats, pans, saws,' etc. The paragraph in question, however, utterly fails to aver facts to show that the emery-belt mentioned therein is of the kind or character of the class of machinery specifically designated by the statute to be guarded. * * * There is also an entire absence of facts to disclose whether it is possible or practicable properly to guard this particular machine without rendering it useless for the purpose for which it is intended to be operated. The burden of showing these facts in the pleading rested on appellee, and the fact, if it is a fact, that the machine or appliance in question is of such a character that it cannot be properly guarded, cannot be said to be a matter of defense to be proved by appellant; for, as previously said, a party who relies upon a statute must bring himself fully and clearly within all its provisions." In view of this decision, the fact that a particular appliance, machine, or part of a machine, is dangerous to those using it, or passing near it in the line of duty as employes, would not be sufficient to bring the injury caused by its being unguarded within the statute; for, manifestly, there are many kinds of appliances and machines and parts of machines wholly different from those particularly mentioned in the statute which may be thus dangerous.

And with the case last mentioned before one, it will not avail to argue that it cannot be supposed properly that the legislature intended to use all the particular names of things preceding the words "and machinery of every description" in the sense in which they intended to use the word ma-

chinery, and that hence it was intended to refer by the subjoined words to something of substantially additional meaning or to machinery of other descriptions than the kinds of appliances and machines or parts of machines previously mentioned.

In the case before us the unguarded appliance and machinery, being a hole in a floor and rollers with knives beneath, operated as described, cannot be said to be an appliance or machine constituting a vat, pan, saw, planer, cog, gearing, belting, shafting or set-screws. The description in the complaint does not show an unguarded thing which can be said to be "of the kind or character of the class of machinery specifically designated by the statute to be guarded."

So, with respect to the other matter to which we have referred, the pleading does not seem to meet the requirements of the latest authorities upon the subject. In our

2. examination of the case, as presented in the briefs, we have observed that evidence was introduced upon the question as to the practicability of guarding the opening in the floor and the machinery beneath it without interfering with the usefulness of the appliances; but if the burden is upon the plaintiff in such a case to show affirmatively in the complaint such practicability by direct averment of facts, it must be conceded that each paragraph of the pleading before us does not contain such averment and therefore is insufficient on demurrer for want of facts. Under such an attack the pleading cannot be aided by inferences or probabilities based upon conjectures.

3. Essential matters of fact must be directly alleged.

See *Robertson v. Ford* (1905), 164 Ind. 538, 545, decided since this appeal was taken. If it was practicable to guard the place, that was a fact, and it was so understood on the trial of the cause in the introduction before the jury of evidence relating to it.

Various questions connected with later stages of the cause have been suggested by learned counsel for decision, but,

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until a complaint that will meet the requirements of

4. the authorities can be framed, this court need not consider such other matters.

Judgment reversed, with instruction to sustain the demurrer to each paragraph of the complaint.

Robinson J., concurs in result.

ADAMS v. CENTRAL INDIANA RAILWAY COMPANY.

[No. 5,628. Filed October 10, 1906.]

1. **PLEADING.—Complaint.—Master and Servant.—Work Outside Scope of Employment.—Variance.**—Where the complaint proceeds upon the theory of an injury to the servant, caused by dangerous work outside of the scope of his employment, and the proof shows that he was working within the scope thereof, a verdict in his favor is not supported. p. 610.
2. **MASTER AND SERVANT.—Assumed Risk.—Telegraphs and Telephones.—Removal of Old Poles.—Defects.**—Where a servant, a part of whose duty was the removal of old telegraph poles and the substitution of new ones, depending upon his own inspection and oversight, climbed an old pole, released the wires at the top preparatory to taking it down, and, because of decay under the ground, rendering the supports placed at the foot of the pole by the servant's assistants insufficient, the pole fell injuring the servant, the risk of danger from such defect was assumed though the defect was not known, and could not have been discovered by the use of ordinary care, by such servant. p. 611.

From Boone Circuit Court; *Samuel R. Artman*, Judge.

Action by Orion E. Adams against the Central Indiana Railway Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

B. F. Ratcliff, Terhune & Adney and *John C. Perkins*, for appellant.

U. C. Stover and *S. M. Ralston*, for appellee.

ROBINSON, C. J.—Appellant sued for damages for a personal injury. Trial by the court, and upon a special

finding of the facts the court stated a conclusion of law in appellee's favor and rendered judgment accordingly.

The only error assigned is that the court erred in the conclusion of law.

The facts found are, in substance, as follows: From March 20, 1903, to October 31, 1903, appellant was employed by appellee as a telegraph repair man, and it was his duty to keep the telegraph poles in proper position, the wires connected, insulated, and clear of all obstructions, and to make all necessary repairs on the line; and, for the purpose of performing such work, he had authority to call on track and section foremen for assistance. In the discharge of his duty appellant was required to and did load and unload telegraph poles and distribute the same, dig holes for such poles, set the same, trim trees to prevent interference with wires, pull slack out of wires, put in new wires, wire the offices, transfer wires from old to new poles, and take down old poles and replace them with new ones. In the performance of such service appellant acted not only under his general employment but frequently upon special orders from appellee's superintendent and train dispatchers, specifying particular work that he should do. On October 31, appellant was ordered by the train dispatcher, to whose orders appellant was subject, to take down a certain pole and transfer the wires from it to a new pole; the removal of the old pole was necessary because it obstructed a driveway being opened to an elevator on the railroad; the pole was about twenty-eight feet high, ten inches in diameter at the base, and four inches at the top, about four feet of the top being formed by a splice; it was about four or five feet higher than the average, but some other poles on the line were as high and some higher; attached to the top were two line wires and a guy wire, extending about thirty feet to a tree, and from the ground to the top were spikes extending out four or five inches called "pole steps." The removal of the old pole and setting the new one and trans-

ferring the wires was work of the same kind and character which appellant had been performing at different intervals during his entire term of service. In removing old poles appellant was required to and did depend upon his own inspection of such poles to determine their safety in climbing the same to remove wires. Appellee had no person in its employ whose special duty it was to inspect the poles and determine their safety for appellant before he would climb the same. The removal of the pole was more dangerous and hazardous than removing an ordinary pole, on account of the pole-step spikes, because he could not climb or slide down the pole rapidly. Appellee did not inform appellant how long the pole had been in use, and did not give appellant any specific instructions as to the method by which the pole was to be removed. The pole had the appearance of an old pole, which appellant and appellee knew. Prior to October 31 appellant had climbed the pole at least twice. In June, 1903, he had climbed the pole and removed the line wires. On October 31, before attempting to take the pole down, appellant inspected it to see whether it was sound or defective. There were no defects or rotten places above the ground, and the pole appeared perfectly safe to climb. No reasonable inspection by either appellant or appellee would or could have disclosed any defect. Appellee did not know of any defect, and could not have known of such defect by the exercise of ordinary care. It was necessary for appellant to climb the pole to remove the line wires, and this was the customary and only way to do it. Appellant was assisted by two men furnished by appellee, who from the appearance of the pole were sufficient to remove it in safety, but on account of the hidden defects two men were not sufficient. After appellant had received the order to remove the pole, he requested the station agent to tell the section foreman to be present with all his section men, seven or eight, to assist. At the time of the accident, after instructing the two men appellee had furnished how to hold and brace the pole, ap-

appellee climbed the same to the top and loosened and removed the line wires as he had done in June. After the line wires were loosened and removed, and while appellant was still at the top of the pole and before he had time to climb down in safety, the pole broke off six or eight inches below the ground where the same was rotten, the bottom tilting up over the raising forks, throwing appellant to the ground, permanently injuring him. In the discharge of his duties appellant was required to conform to the following rule:

“Care must be taken to see that men are not injured by poles’ breaking. When the last wire is removed from old poles, foremen will see that the poles are held up, either with ropes or forks, and in all cases the linemen should carry the last wire part way down the pole with him, or let it away from the pole with rope while he climbs down. The utmost care must be exercised in this matter, and no excuse will be received for failure to observe these instructions.”

Prior to his injury appellant had made a requisition upon appellee for a rope which appellee had failed to furnish. In order safely to perform the work of removing the pole it was necessary to have a rope to stay the pole, or sufficient men to hold the same up with forks, and from the apparent condition of the pole two men with forks were sufficient, but on account of the actual, hidden condition two men were not sufficient.

Appellant’s complaint proceeds upon the theory that the work appellant was ordered to do was without the scope of

his employment, and was more hazardous and dan-

1. gerous than the work for which he was employed.

But the facts found are that the work he was engaged in when injured was work of the same kind and character as he had been performing at different intervals during his entire term of service as telegraph repairman of appellee, and that in the removal of old poles appellant was required to and did depend upon his own inspection of such

poles to determine their safety. The facts further show that he was given no specific instruction as to the method by which the pole was to be removed. The paragraphs of complaint must be construed as proceeding upon the theory that appellant had been specially ordered to perform work outside the line of his duty, and that this service was more hazardous and dangerous than he was regularly employed to do. The facts found make a very different case.

It clearly appears from the facts found that the injury was caused directly by the manner in which the work was done. It is unnecessary to cite authorities in sup-

2. port of the rule that it is the duty of an employer to furnish an employe sufficient help safely to perform the work required of him. But it is found as a fact that appellant was required to and did depend upon his own inspection of the poles to determine their safety, and that from the appearance of the pole two men were sufficient to remove it in safety. The pole had the appearance of an old pole, which fact appellant and appellee both knew. He was not relying upon any inspection of the pole by appellee, but depended upon his own inspection. From his knowledge of common affairs he must have known that an old pole might be defective beneath the surface of the ground, and that climbing a pole and loosening the wires might subject it to greater strain than that of sustaining line wires while in position. He knew that it was necessary for him to climb the pole to remove the wires, and that that was the only way the wires could be removed. He did inspect the pole and found no defect above the surface of the ground, and from his own inspection concluded that it was safe to climb it, and that two men would be enough to assist in taking it down. He must have known that poles become decayed beneath the surface of the ground after a time, and that a pole appearing to be old might be decayed beneath the surface. He was not controlled by any superior as to the manner of doing the work. He was employed to do

that kind of work and had been engaged at it for several months. As between him and the company, the company was under no obligation to inspect the pole to see if it was decayed. The burden was upon appellant to show that the accident was caused by some neglect of duty on appellee's part, but the finding fails to show such neglect. From the facts as found we can but conclude that the risk of falling on account of the weakness of old poles was a risk that appellant assumed by his contract of employment. *Dixon v. Western Union Tel. Co.* (1895), 68 Fed. 630; *Greene v. Western Union Tel. Co.* (1896), 72 Fed. 250; *Sias v. Consolidated Lighting Co.* (1901), 73 Vt. 35, 50 Atl. 554; *Flood v. Western Union Tel. Co.* (1892), 131 N. Y. 603, 30 N. E. 196; 1 Labatt, Master and Serv., §434; *McIsaac v. Northampton, etc., Co.* (1898), 172 Mass. 89, 51 N. E. 524, 70 Am. St. 244; *Evansville Gas, etc., Co. v. Raley* (1906), ante, 342; *Ervin v. Evans* (1900), 24 Ind. App. 335.

Judgment affirmed.

BURTON ET AL. v. CARNAHAN ET AL.

[No. 5,795. Filed October 10, 1906.]

1. *WILLS.—Remainders.—Time of Vesting.—Words of Survivorship.*—The law favors the earliest possible vesting of remainders; and words of survivorship in a will are construed as relating to the time of the death of the testator unless the will clearly says otherwise. p. 614.
2. *SAME.—Construction.—Rules of Law.—Conflict.*—The intention apparent in a will, will be given effect where it does not interfere with the established rules of law. p. 614.
3. *SAME.—Devises.—Limiting by Subsequent Clause.*—A certain estate devised in one clause of a will cannot be defeated by a subsequent clause, though the intention to do so is clear. p. 614.
4. *SAME.—Estates.—Rule in Shelley's Case.*—A will devising certain lands to a daughter "to be by her held during her natural life and no longer, and at her death the same to go to and vest in her bodily heirs forever and in fee simple," and

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providing in a subsequent clause that in case said daughter "should die without issue of her body living," then over to her brothers and sisters, gives such daughter a fee-simple title to such lands. p. 615.

5. *WILLS.—Remainders.—Vesting.*—Where a will devises a fee-simple title to a daughter and provides in a subsequent clause that in case such daughter "should die without issue of her body living" then such land should go to her brothers and sisters, the contingency of the daughter's death has reference to her death before the death of such testator. p. 615.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Suit by David M. Burton and others against Thomas J. Carnahan and another. From a judgment for defendants, plaintiffs appeal. *Affirmed.*

John H. Miller and *Lucius C. Embree*, for appellants.

Thomas Duncan, for appellees.

COMSTOCK, P. J.—Suit to quiet title to real estate. Alexander Burton died July 25, 1898, testate, the owner of the real estate in controversy, leaving as his only heirs at law, his widow, Mary E. Burton, and five children, the appellants, David M. Burton, Martha A. Sokeland, Mary A. Ahleman, and Hettie B. Niekamp, and also Amie I. Burton. The widow died April 11, 1903, and on August 12, 1903, the daughter Amie I. married the appellee Carnahan. She died March 21, 1904, leaving her husband, but no issue or descendants surviving her.

The record presents for decision but one question: What interpretation shall be placed upon the will of said testator? The only parts material to the matter in dispute are the first and sixth items. The first item gives to the widow a life estate in the real estate in question. Item six is as follows:

"It is my will and desire, and I so desire, that upon the death of my wife the following part of my real estate so devised to my wife as above set out shall go to my daughter, Amie I. Burton, to be by her held

during her natural life and no longer, and at her death the same to go to and vest in her bodily heirs forever and in fee simple, to wit: The northwest quarter of the northeast quarter of section sixteen, township three south, range nine west, the same being forty acres more or less.

In case said Amie I. Burton should die without issue of her body living, then and in that case said land so devised to her shall go to and vest in her brother and sisters equally and the descendants of such as may be dead."

If said will gave to Amie I. a fee simple, the judgment of the trial court must be affirmed. If the title to said lands on the death of said Amie I., by virtue of the conditional limitations of said item six, vested in appellants, then the judgment must be reversed.

The law favors the vesting of remainders at the earliest possible moment, and, in harmony with the rule just stated, words of survivorship in a will are con-

1. strued as referring to the death of the testator in all cases where the words of the instrument are not such as clearly show that they refer to a subsequent date. *Taylor v. Stephens* (1905), 165 Ind. 200, and cases cited; *Campbell v. Bradford* (1906), 166 Ind. 451; *Moore v. Hare* (1896), 144 Ind. 573; *Harris v. Carpenter* (1887), 109 Ind. 540; *Hoover v. Hoover* (1889), 116 Ind. 498.

The purpose in construing a will is to ascertain the intention of the testator, and to carry it out, so far as the same may not interfere with the established

2. rules of law. *Fowler v. Duhme* (1896), 143 Ind. 248.

Devises in one clause cannot be defeated by a devise in a subsequent clause. *Ross v. Ross* (1893), 135 Ind. 367.

"Even a clear intention of the testator cannot be

3. permitted to contravene the settled rules of law by depriving any estate of any of its essential legal attributes." *Mulvane v. Rude* (1896), 146 Ind. 476, 485.

It is admitted by appellants' counsel that the rule in *Shelley's Case* (1579), 1 Coke *88, applies here. It is settled that that rule is a rule of property, and not

4. of construction in this State. *Teal v. Richardson* (1903), 160 Ind. 119. Said rule is: "When a freehold is devised to the ancestor for life and by the same instrument it is limited, either mediately or immediately to his heirs or the heirs of his body, the word 'heirs' is a word of limitation and not of purchase, and the ancestor takes the same in fee or in tail, as the case may be." It is profitable to refer to the different cases in which the court has applied the rule to language substantially the same. The case at bar cannot be differentiated from the recent case of *Taylor v. Stephens, supra*. In the case last named, the will gave to the widow the real estate during life, and provided that "at the decease of my said wife I desire that said lands be owned equally and jointly by my children, * * * or in case of the decease of any of said children, his or her share to descend to the heirs of their body, if any, and if not, to those surviving." The court held that the children named in the will took thereunder a vested remainder upon the death of the testator. The case is instructive upon the rules of construction and the reasons therefor.

Under the rules, the clause of the will before us, in regard to the death of said Amie I., not leaving children surviving her, has reference to the death during the

5. lifetime of the testator. Said Amie took a vested remainder upon the death of her father.

Judgment affirmed.

NEVER-SPLIT SEAT COMPANY v. CLIMAX SPECIALTY COMPANY.

[No. 5,709. Filed October 11, 1906.]

1. APPEAL AND ERROR.—*Weighing Evidence*.—The verdict is conclusive on appeal in cases of conflict of evidence. p. 616.
2. TRIAL.—*Instructions*.—*Not Applicable to Evidence*.—Instructions, not applicable to the evidence, though correct statements of the law, are properly refused. p. 617.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Action by the Climax Specialty Company against the Never-Split Seat Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Herman & Miedreich, for appellant.

Van Buskirk & Osborn, for appellee.

ROBY, J.—This is an action to recover the agreed price of 5,000 pairs of brass closet hinges. They were made for the Crown Seat Company, a corporation, whose business has been taken over by the appellant company, which is admittedly liable for claims against it.

The goods were manufactured under a contract, the terms of which are contained in certain letters and telegrams. The order was "to make us a hinge as your 'C' with arms same length as samples sent you. * * * Your 'C' hinges cannot be used on oval seats because the arms are too short. If this is correct, book our order for 5,000 pairs and send us 1,000 pairs at once."

The sample accompanied the order. It is not disputed that the goods were made and shipped, and partly paid for.

Appellant claims that they did not correspond to the

1. sample. There is a sharp conflict of evidence, and the findings of the jury must be taken as settling the fact against it. Indeed, careful consideration leads to the conclusion that the verdict is sustained by the weight of evidence.

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The court submitted the cause to the jury upon clear and correct instructions. Instructions one and two, requested by the appellant, state abstract propositions of law
 2. correctly, but are not applicable to the facts or issues. No reversible error appears from the record. The judgment is therefore affirmed.

STEVENS ET AL. v. WOODERSON.

[No. 5,811. Filed October 12, 1906.]

1. **PLEADING.**—*Answer.*—*Estoppel.*—*Husband and Wife.*—An answer, to estop an undivorced wife from asserting her rights in land afterwards sold by her husband, an alleged subsequent wife executing the deed with him, is bad, where it fails to show that plaintiff knew that the husband owned the land, was trying to sell it, or that the purchaser relied upon or was induced to buy it by reason of anything plaintiff did. p. 619.
2. **ESTOPPEL.**—*Misrepresentations.*—*Belief in.*—*Action Upon.*—Misrepresentations, to be sufficient to create an estoppel, must be believed and acted upon to the plaintiff's injury. p. 619.
3. **APPEAL AND ERROR.**—*Weighing Evidence.*—The court cannot weigh conflicting oral evidence on appeal. p. 619.
4. **HUSBAND AND WIFE.**—*Subsequent, Void Marriage.*—*Rights of Widows.*—The legal widow takes her statutory rights in all of her deceased husband's property, in whose transfer she did not join, though the grantee was ignorant of her marriage to such husband and believed him married to the woman who lived with him and who joined in the execution of the deed. p. 620.

From Starke Circuit Court; *Harley A. Logan*, Special Judge.

Suit by Elmira J. Wooderson against Dora A. Stevens and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

Burson & Burson and *W. A. Foster*, for appellants.

George W. Beeman and *Rich & Rich* for appellee.

ROBINSON, C. J.—Some time in 1882 Thomas P. Wooderson, at South Bend, Indiana, secured a divorce from his

wife, Phoebe, and afterwards, on October 10, 1882, at Niles, Michigan, was married to appellee, Elmira J. Wooderson, and they lived together at South Bend as husband and wife until in November, 1885, when they separated. They were never divorced. Sometime between November, 1885, and August, 1888, Thomas P. Wooderson was in Iowa, and while there married Mary Wooderson. He was divorced from her in Starke county, Indiana, October 24, 1888, by decree of the Starke Circuit Court. In November, 1888, in Starke county, he married Matilda Harkins. They were divorced by decree of the Starke Circuit Court on January 17, 1894. On January 29, 1894, they were remarried in Starke county, and were again divorced by decree of the Starke Circuit Court June 5, 1894. In April, 1894, Thomas P. Wooderson went to Kentucky, and a short time prior to July 13, 1894, he returned to Starke county with Ettolia Wooderson, a woman whom he held out to be his wife, and who had a marriage certificate dated "the fore part of April, 1894," and showing that they had been married in Kentucky. Wooderson had his place of residence continuously in Starke county, Indiana, from November, 1885, to August, 1894. He died in Ohio in 1896. On August 4, 1894, Thomas P. Wooderson and Ettolia, as his wife, executed to appellant Dora A. Stevens their warranty deed for certain real estate in Starke county, which includes the lands in controversy, which deed was recorded August 9, 1894, and for all the lands conveyed appellant paid \$1,200. For twenty-four years last past appellee has lived continuously at South Bend, and had not visited Starke county prior to the commencement of this suit, and has not executed or joined in any conveyance for the land in controversy, and has never received any part of the proceeds from sales of land of Thomas P. Wooderson. Additional facts are set out in the finding, authorizing the conclusions drawn, that appellee is the widow of Thomas P. Wooderson, owns in fee the

undivided one-third of the land, and is not estopped from asserting her interest therein.

The second paragraph of appellant Dora A. Stevens's answer, which undertakes to plead facts that would estop appellee from claiming title, and to which a de-

1. murrer was sustained, is bad, if for no other reason than because of its failure to show that appellee knew after her husband left her in 1885 that he was the owner of real estate in Starke county, and that he was selling and attempting to transfer it. Neither does the paragraph allege that appellant Stevens relied upon anything that was said or done by appellee, and that she was induced thereby to take the deed, but alleges that she was induced to accept the conveyance from Thomas P. and Ettolia Wooderson because the public records disclosed that the title was in Thomas P. Wooderson, and because of the "general reports in the town of Knox and neighborhood and the appearances and actions of the parties, whereby she was led to believe, and did believe, that said Wooderson was the legal husband of said Ettolia, who signed said deed as his wife." The rule is thus stated in 2 Pomeroy, Eq. Jurisp. (2d ed.), §812: "Whatever may be the real inten-

2. tion of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action."

We cannot disturb the finding upon the evidence. Considering all the evidence, the court could properly conclude that appellee was not estopped from asserting title

3. to the land. This suit was brought in 1904, and it is found as a fact that appellee had no knowledge

that Thomas P. Wooderson was conveying real estate, and had no knowledge, until a short time prior to the beginning of this action, that he had at any time owned the lands in question.

The evidence discloses that from 1882 to 1894, so far as Wooderson was concerned, the matrimonial bureau was in perfect working order, and that during those

4. years the divorce machine was working with faithful regularity, except that sometime between 1885 and 1888 it failed to register, and again in 1894, when it seems to have registered late. It is true appellant Stevens was misled into believing that when the deed was made Ettolia was the lawful wife of Thomas P., but she was not relying upon anything that appellee had said or done. It was generally reputed in the neighborhood that they were husband and wife, but it seems this had at one time been doubted by a committee of women who visited the couple and requested to see the marriage certificate. Appellant Stevens testified that she knew Ettolia Wooderson; that at or about the time the deed was made she had a conversation with Ettolia; that Ettolia exhibited to the witness her marriage certificate; that witness remembered the marriage certificate stated that Thomas P. and Ettolia were married at West Liberty, Kentucky, the "fore part of April, 1894," "along in the spring of 1894;" that while they were negotiating for the purchase of the land the witness heard that Wooderson had obtained a divorce from Matilda Harkins; that she heard it from Mr. Wooderson himself; that her husband examined the records in relation to the land and told her what the records showed. So that it seems there was some doubt in appellant Stevens's mind at the time the deed was made as to whether Ettolia was the lawful wife of Thomas P. And at that time the records of the Starke Circuit Court disclosed that Thomas P. was not divorced from Matilda after the second marriage with her until June 5, 1894, which was subsequent to the date which appellant

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says the certificate showed his marriage with Ettolia. The evidence shows, and the court finds, that from the time Wooderson put aside appellee and married Mary, and continuously until the deed was made, he resided in Starke county, and that he never was divorced from appellee.

Judgment affirmed.

COOL v. McDILL.

[No. 5,848. Filed October 12, 1906.]

1. PLEADING.—*Complaint.—Construction.—Doubt.*—A pleading, in cases of doubt, will be construed most strongly against the pleader. p. 622.
2. SAME.—*Complaint.—Theory.—Construction by Trial Court.*—A complaint will be construed on appeal according to the construction adopted and acquiesced in by the parties at the trial. p. 623.
3. TRIAL.—*Complaint.—Theory.—Evidence.—Variance.*—Where the complaint proceeds upon a definite theory and the evidence shows a substantially different one to be true, no recovery is permitted. p. 623.
4. CONTRACTS.—*Construction.—Enforcement.*—Contracts should be enforced according to the intention reasonably deduced from the language thereof. p. 623.
5. SAME.—*Construction.—Interpretation.*—In the construction thereof a contract should be considered as a whole; and the evidence may be considered, as giving a correct viewpoint for its interpretation, not for the purpose of changing the contract but of enforcing it in its true intent. p. 623.
6. SAME.—*Not to Engage in Business.—Clerkship.*—A contract by a person dealing in second-hand goods “not to engage in the business of conducting a second-hand store or to buy or sell second-hand goods” in his home city, does not prevent him from clerking for another dealer in second-hand goods in such city. p. 624.

From Boone Circuit Court; *Samuel R. Artman*, Judge.

Suit by Byron M. Cool against John McDill. From a decree for defendant, plaintiff appeals. *Affirmed.*

Palmer & Palmer, for appellant.

Leonard J. Curtis, for appellee.

BLACK, J.—This was a suit brought by the appellant against the appellee. The decision on the trial being in favor of the appellee, the appellant moved for a new trial, and the question as to the sufficiency of the evidence is presented here. May 23, 1904, the appellee having been for some years engaged in the business of conducting a second-hand store—buying and selling second-hand goods—in the city of Frankfort, Clinton county, the parties hereto entered into a contract in writing, whereby the appellee agreed to sell and the appellant agreed to buy the stock of second-hand goods then contained in a certain building in that city, the possession of the goods to be delivered on the payment of the purchase price in cash, which was to be arrived at by inventory, the appellee to deliver to the appellant a perfect title to the goods with an affidavit that they were the exclusive property of the appellee, that he was the sole owner and had a right to sell them, and that there were no incumbrances, mortgages or other liens upon any of them, the appellant to take all the goods then in said premises unless the parties should otherwise agree. The contract contained the following provision:

“Said McDill also agrees not to engage in the business of conducting a second-hand store or to buy or sell second-hand goods in said city, at any time in the future while said Cool is engaged in said business.”

Thereupon the sale was consummated, the appellant paying the sum of \$508 as the purchase price; and the appellant, from the time of the sale, continued said business in said premises, and was still so doing at the commencement of the suit and at the time of the trial.

The suit was for an injunction, and not for damages; and looking to the complaint for allegations of acts of the appellee in which he was still engaged, we find the

1. pleading quite obscure and uncertain, and, to some extent, evasive. It is, however, capable, when construed most strongly against the pleader, of being taken as

charging that the appellee was engaged in the business of conducting at said city a second-hand store and of buying and selling second-hand goods, being the owner or part owner of the store and business and goods, but carrying on the business in the name of another person named, who either had no real interest or was only a part owner. This

seems to have been the view of the complaint taken

2. by the parties on the trial, wherein the appellant sought to prove such proprietorship, and the appellee sought to prove that he was not an owner or a part owner, but was an employe working for weekly wages for another person who was the owner of the second-hand store and business, to whose orders as employer the appellee was subject. The court manifestly regarded the evidence as sufficiently establishing the position so taken by the appellee on the trial.

The proof, therefore, failed to correspond with the allegations of the complaint, as so construed; and for this reason we cannot say that the finding was not sus-

3. tained by sufficient evidence, for the plaintiff must recover only upon some definite theory shown in his complaint. He cannot proceed upon one theory and recover upon a substantially different one.

A meaning consistent with reasonableness should be ascribed to the language of the contract, if it will

4. admit thereof, and with such meaning, if fairly attributable, the contract should be enforced.

The first thing is to ascertain the intention of the parties, and in seeking it the whole contract should be considered, the several parts of which should be regarded as

5. having been intended to be in harmony with each other and as having been included to subserve a consistent purpose. The nature of the transaction and the character of the interests to be protected may be considered, and the situation and business of the parties and their relation to each other may be ascertained, and the court

may properly put itself, by means of evidence, in the point of view occupied by the parties when they made the contract, not for the purpose of changing the contract as expressed in writing, but for the purpose of enforcing it according to its true intent. See *Merica v. Burget* (1905), 36 Ind. App. 453.

Considering the language of the restraining provision before us in connection with all other portions of the contract, and looking from the standpoint of the parties

6. as seller and buyer of the stock in trade and business of a second-hand store in the city where the seller with his family had resided for many years and continued thereafter to reside, where, in the language used by the appellant in his pleading, the appellee for several years before the sale to the appellant "was engaged in buying and selling second-hand goods and conducting a second-hand store," we think the provision that the appellee agreed "not to engage in the business of conducting a second-hand store or to buy or sell second-hand goods in" that city, taken in the ordinary sense of the language in such a connection, may be regarded as meaning that the appellee should not resume what he was thus quitting by going into business as he had been in it, and thus competing by his own rival business with the business of the second-hand store which he was selling. There is no reason to suppose that more than this was in the minds of both the contracting parties. If more had been intended, and if it had been the purpose to restrain the appellee from taking employment at periodical wages, from another proprietor conducting another second-hand store, without appellee's having any ownership of the goods or commission on business done or interest in profits or losses, it may be supposed that ordinarily something to such effect would have been inserted; and it is an intention consistent with the ordinary meaning of the language that must be sought.

Language used by a physician or lawyer or other person who has sold out merely the business of exercising his personal skill might be sufficient to restrain him from taking employment, which when used of a person who sold out the goods and business of a mercantile establishment would not be regarded as restraining him from taking employment from another merchant. The court will not, for the purpose of extending the restraint, imply a meaning which cannot reasonably be regarded as within the intention of both the parties.

We need not decide whether such additional restraint, preventing the appellee from taking employment, if fairly within the meaning of the parties, would be reasonable and consistent with public policy.

Judgment affirmed.

COLLINS v. THE STATE.

[No. 6,047. Filed October 12, 1906.]

1. WORDS AND PHRASES.—“*Device*.”—A “device” is a thing devised or formed by design, a contrivance, an invention. p. 626.
2. INDICTMENT AND INFORMATION.—*Intoxicating Liquors.—Permitting Music Box to Remain in Saloon.*—An indictment charging that defendant unlawfully permitted a certain device for music, to wit: a Regina music box to be and remain in his saloon, does not state an offense under §7283b Burns 1901, Acts 1895, p. 248, §2, providing that it shall be unlawful to permit any “devices for amusement or music of any kind or character” in a saloon. p. 627.
3. STATUTES.—*Construction.—Wrongs To Be Remedied.*—In the construction and interpretation of a statute the courts will consider the wrongs the legislature sought to remedy. p. 627.
4. SAME.—*Construction.—Punctuation.—Intoxicating Liquors.*—Section 7283b Burns 1901, Acts 1895, p. 248, §2, reading in part: “And no devices for amusement or music of any kind or character,” properly interpreted requires a comma after the word “amusement,” and it will be considered as though the comma was so inserted. p. 628.

From Elkhart Circuit Court; *James S. Dodge*, Judge.

Prosecution by the State of Indiana against Edward Collins. From a judgment of conviction, defendant appeals. *Reversed.*

Lou W. Vail, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *H. M. Dowling* and *W. C. Geake*, for the State.

MYERS, J.—In the court below appellant was charged by indictment, tried, convicted, and fined \$10 for an alleged violation of §7283b Burns 1901, Acts 1895, p. 248, §2. His motion to quash the indictment was overruled, and this ruling is here assigned as error.

The gist of the charge, as presented by the indictment, is that appellant, a licensed liquor dealer, on October 10, 1905, in Elkhart county, then and there unlawfully permitted a certain device for music, to wit, a Regina music box, to be and remain in the room in which he was then engaged in selling intoxicating liquors in less quantities than a quart at a time.

Appellant, in support of his motion to quash, insists that there is no statute in this State making it unlawful to permit a device for music to remain in a licensed saloon. That part of §7283b, *supra*, applicable to the question now before us, provides: "All persons holding license * * * authorizing the sale of spirituous, vinous, malt or other intoxicating liquors in less quantities than a quart at a time, shall provide for the sale of such liquors in a room separate from any other business of any kind, and no devices for amusement or music of any kind or character, * * * shall be permitted in such room."

A "device" is defined to be that which is devised or formed by design; a contrivance; an invention. Century Dict.; Webster's Dict.; *State v. Blackstone* (1893),

1. 115 Mo. 424, 427, 22 S. W. 370; *Henderson v. State* (1877), 59 Ala. 89.

The question is, does the indictment charge appellant with any offense under this section of the statute? We think not. Admitting that a music box is a device

2. or a mechanical invention and might be used to amuse and entertain, yet the indictment is far from charging that it was a device then and there permitted in the room for amusement, or that appellant then and there permitted music in the room, produced by such device. The State argues that it was the intention of the legislature to exclude music from saloons, and in order to do so it legislated against devices for music in saloons; that is to say, by doing away with the devices, they necessarily did away with the music. We are not persuaded to place this construction on the language of this statute. For to do so would open the way to every saloon owner in the State to install in his place of business one or more vocalists to entertain his patrons and allure others into his place, in the hope of increasing his business. A familiar rule of interpretation of statutes is to ascertain the legislative intention and

3. the purpose to be accomplished by the statute under consideration (*Western Union Tel. Co. v. Braxtan* [1905], 165 Ind. 165; *Board, etc., v. Board, etc.* [1891], 128 Ind. 295), and, if possible, give it that construction which will carry out that intention, and best promote the object of its enactment. *Abbott v. Inman* (1905), 35 Ind. App. 262.

Reading this statute in the light of the history of conditions when enacted and the mischief to be remedied, we must conclude that the true purpose and intent of the legislature by such enactment was to prohibit in saloons not only devices for amusement, but music of every kind or character, whether produced by the voice or a musical invention. It was evidently the intention of the legislature to stop the alluring of people by means of amusements or music, into rooms where liquors are sold, thereby discoura-

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ging the liquor traffic and minimizing its evils by rendering uninviting the places where the same is sold.

The addition of a comma after the word "amusement" and before the word "or" is all that is required to give the section of the statute now under consideration the ef-

fect the legislature clearly intended for it. This being true, it will be construed as though the comma was inserted. *United States v. Lacher* (1890), 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; *Hammock v. Farmers Loan & Trust Co.* (1882), 105 U. S. 77, 84, 26 L. Ed. 1111; *Allen v. Russell* (1883), 39 Ohio St. 336. We are therefore of the opinion that the indictment does not charge appellant with any violation of the statute upon which it is predicated.

Judgment reversed, with a direction to sustain the motion to quash.

HOBBS v. TOWN OF EATON.

[No. 5,647. Filed June 26, 1906. Rehearing denied October 12, 1906.]

1. PLEADING.—*Complaint.*—*Theory.*—*Briefs.*—The Appellate Court in determining the theory of a complaint may examine the whole record and also the briefs of counsel. p. 630.
2. APPEAL AND ERROR.—*Trial.*—*Rulings.*—*Presumptions.*—Appellate courts will indulge all reasonable presumptions in favor of the rulings of the trial court. p. 631.
3. PLEADING.—*Complaint.*—*Execution.*—*Supplemental Proceedings.*—*Surplusage.*—*Statutes.*—A complaint showing that plaintiff recovered a judgment against defendant; that execution was returned unsatisfied; that defendant is a resident of the county; that his codefendant owes him money which an execution will not reach and which the defendant "wrongfully refuses and fails to apply to the satisfaction of said judgment," states a cause of action under §§827, 831 Burns 1901, §§815, 819 R. S. 1881, the quoted clause being treated as surplusage. p. 631.
4. EXECUTION.—*Exemption.*—*Road Labor.*—*Statutes.*—No exemption can be claimed by virtue of §715 Burns 1901, §708

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- R. S. 1881, as against an execution on a judgment for commutation on defendant's failure to work the roads as provided by §6825 Burns 1901, Acts 1883, p. 62, §11. p. 631.
5. **EXECUTION.—Exemptions.—Right of.**—The right of exemption is purely statutory. p. 632.
 6. **APPEAL AND ERROR.—Questions Presented Twice.—Disposal of.**—A question, on appeal, decided on the sufficiency of the complaint will not be decided again on the ruling on a motion for a new trial. p. 632.
 7. **TRIAL.—Evidence.—Surplusage.**—It is not necessary to offer any proof to support surplusage in the pleadings. p. 632.
 8. **NEW TRIAL.—Evidence.—Supplemental Proceedings.**—The transcript of a justice's docket showing a judgment against defendant for commutation for failure to work the road, together with evidence that such judgment is in force and uncollectible by execution, sustains a judgment in supplemental proceedings against defendant's debtor and in denial of defendant's alleged exemption. p. 632.
 9. **EVIDENCE.—Judgment.—Collateral Attack.—Execution.—Supplemental Proceedings.**—The original judgment cannot be attacked, in a supplemental proceeding, by evidence tending to show it was erroneous, where no issue is made as to its validity. p. 633.
 10. **APPEAL AND ERROR.—Weighing Evidence.**—The Appellate Court cannot weigh conflicting oral evidence. p. 633.
 11. **SAME.—Independent Assignments.—New Trial.**—Questions which can be included in a motion for a new trial cannot be assigned independently on appeal. p. 634.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Supplemental proceedings by the Town of Eaton against Absalom B. Hobbs and another. From a judgment for plaintiff, defendant Hobbs appeals. *Affirmed.*

James W. Brissey and *John E. Ethell*, for appellant.

Rollin Warner, *Edward M. White* and *William F. White*, for appellee.

MYERS, J.—This is a proceeding supplementary to execution, begun by appellee against appellant and the Muncie, Hartford & Ft. Wayne Railway Company, by a duly verified complaint in one paragraph. Demurrer to the complaint for want of facts overruled. Denial filed, trial, and

judgment for appellee. Motion for a new trial overruled.

(1) The first error assigned questions the sufficiency of the complaint.

The complaint in substance states that appellee recovered a judgment, before a justice of the peace, against appellant for less than \$50; that execution was issued and returned, "no property found;" that thereafter a transcript of the proceedings and judgment before the justice was filed in the Delaware Circuit Court; that another execution was issued to the sheriff of Delaware county, and was returned wholly unsatisfied; that appellant, Hobbs, has been, continuously since the rendition of said judgment, and now is, a resident of Delaware county, Indiana; that the Muncie, Hartford & Ft. Wayne Railway Company is indebted to appellant on account of wages earned in the sum of \$40; that appellant has no other property; that appellee's judgment before said justice of the peace is founded on appellant's failure to pay commutation, as provided by §6825 Burns 1901, Acts 1883, p. 62, §11, and is without relief and without right of exemption; that the property of "Hobbs so in the possession of said railway company is not exempt from being applied to the satisfaction of said judgment, but cannot be reached by an ordinary execution in the hands of the sheriff." Other allegations in the pleading tend to obscure the theory of the pleader, and render doubtful whether this proceeding is under §827 Burns 1901, §815 R. S. 1881, or §828 Burns 1901, §816 R. S. 1881, in connection with §831 Burns 1901, §819 R. S. 1881. Appellant argues that it is under §§828, 831, *supra*, while appellee claims that it is based on §§827, 831, *supra*.

In view of the different constructions placed upon the pleading, it becomes our duty to determine the theory of the complaint, and in doing this we may look to the

1. entire record, as well as all briefs of counsel in the case. *Carmel Nat. Gas, etc., Co. v. Small* (1898), 150 Ind. 427. From the information thus obtained, and

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from the most prominent and leading allegations of the complaint above exhibited, and indulging all reason-

2. able presumptions in favor of the proceedings and judgment of the trial court (*Campbell v. State* [1897], 148 Ind. 527; *Center School Tp. v. State, ex rel.* [1898], 20 Ind. App. 312), it would seem that the cause proceeded to judgment on the theory that the com-

3. plaint stated a cause of action under §831, *supra*, in connection with §827, *supra*. In view of this conclusion the allegation, "which said sum of \$40 said defendant, Hobbs, unjustly, unlawfully and wrongfully refuses and, fails to apply to the satisfaction of said judgment," is not controlling and will be treated as surplusage, and the complaint on the theory stated will be held sufficient on demurrer to authorize the execution plaintiff to invoke the assistance of the court to enforce its judgment. *Burkett v. Bowen* (1889), 118 Ind. 379; *Sherman v. Carvill* (1880), 73 Ind. 126; *Fowler v. Griffin* (1882), 83 Ind. 297.

Appellant argues that, under the averment of the complaint, it clearly appears that the property appellee is seeking to have applied to the payment of its judg-

4. ment, together with all of his other property, does not amount to \$600, and the same is therefore exempt from levy. On this question the complaint shows that the judgment in the original action was rendered without "benefit of exemption," and was predicated upon a statutory liability of appellant to appellee. §6825, *supra*. This statute expressly provides that no stay of execution or benefit of exemption, valuation or appraisement law shall be allowed on a commutation money judgment. The language of our statute on this subject is plain, its validity unquestioned, and in this class of cases must control the debtor's right of exemption as against the general provision. §715 Burns 1901, §703 R. S. 1881; *Winfield Tp., ex rel., v. Wise* (1880), 73 Ind. 71. Property exemption from levy and

sale by judgment creditors in this jurisdiction is

5. purely statutory, and it is with the legislature to say to what class of debts it shall apply. And, having expressly provided that a judgment for commutation money shall be without the benefit of exemption, the statute authorizes the judgment creditor to have any property in the possession of appellant's codefendant belonging to such debtor applied to the payment of such judgment, or so much thereof as is necessary fully to satisfy the same. Therefore it follows that the complaint in this action is not affected by this question.

(2) Appellant also assigns error of the court in overruling his motion for a new trial. The reasons assigned in support of this motion are that the decision of the court is not sustained by sufficient evidence and is contrary to law. Under this assignment the questions argued are that there is no evidence to sustain the following allegations of the complaint: (1) That appellant "unjustly refuses" to apply the money sought to be reached in payment of the judgment. (2) That such money is not exempt from execution. Also that the decision of the court is contrary to law.

What we have said in disposing of the demurrer to the complaint largely applies to the questions presented under this assignment, and practically disposes of them

6. contrary to appellant's views. Having treated the allegation in the complaint "unjustly refuses" as surplusage, the question of whether there was any evidence tending to support it is immaterial. On the ques-

7. tion of exemption, appellee introduced in evidence all of the pleadings and proceedings, including the judgment before the justice of the peace, from which it appears that the issue in that case was the question

8. of appellant's liability to appellee for what is known and designated by our statute as commutation money. The pleadings in that case were sufficient to ap-

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prise the court trying this case as to the nature of that action, and as the law is effective to bar appellant's right of exemption, in the enforcement of such judgment, we cannot say in this particular there was no evidence to support the decision of the court, nor that the decision of the court was contrary to law. But aside from the theory last stated, appellant has pointed out no error in this

9. regard, for the further reason that this is an independent action, in no way affecting the merits of the action in which the original judgment was rendered. Therefore, any evidence which would tend in any way to interfere with, alter or change the face of the original judgment would be improper. *Harper v. Behagg* (1896), 14 Ind. App. 427. The original judgment stands unimpeached, unappealed from, and with validity unquestioned. And, as this action is not a continuation of or an incident to the original action, there is no issue to support evidence, the effect of which would be to affect the rights of the parties under the original judgment (*Harper v. Behagg, supra*, and cases there cited), for the reason that the only issue now presented is that of affording appellee that relief to which he is entitled, under the terms of his judgment.

Appellant insists that the weight of the evidence is in his favor. The evidence in this case is in part verbal.

Therefore, under the decisions of the Supreme Court and this Court, we cannot examine the evidence to determine where the preponderance lies. *Parkison v. Thompson* (1905), 164 Ind. 609; *Hudelson v. Hudelson* (1905), 164 Ind. 694; *Tyler v. Davis* (1906), 37 Ind. App. 557. The decision of the court in this case is clearly within the issue, and it appearing from the evidence that the Muncie, Hartford & Ft. Wayne Railway Company, one of the defendants below, has in its possession property belonging to appellant, which property is not, by the terms of the judg-

ment, exempt from its payment, and this action being in aid of such judgment, warrants the conclusion that the decision of the court in so ordering its application is not contrary to law.

Other errors are assigned, some of which have been discussed and decided under the above assignments. The

remaining ones, upon an examination, we find

11. to be reasons in support of a motion for a new trial.

Finding no error in the record, the judgment of the trial court is affirmed.

ELWOOD NATURAL GAS & OIL COMPANY ET AL.
v. GLASPY.

[No. 5,932. Filed May 11, 1906. Rehearing denied October 12, 1906.]

PLEADING. — *Complaint.* — *Exhibits.* — *Contracts.* — *Injunction.*

—A complaint to prevent a gas company from violating its contract to furnish plaintiff gas so long as the supply lasts, which fails to set out a copy of such contract or an exhibit thereof, is bad.

From Madison Circuit Court; *Daniel W. Comstock*, Special Judge.

Suit by Michael Glaspy against the Elwood Natural Gas & Oil Company and others. From a decree for plaintiff, defendants appeal. *Reversed.*

Gilbert R. Call, for appellants.

Bartlett H. Campbell and *Ward L. Roach*, for appellee.

BLACK, P. J.—The appellee sued the appellants, Elwood Natural Gas & Oil Company, Citizens Gas & Mining Company and Citizens Heat & Light Company. A demurrer of each of the appellants to the complaint for want of sufficient facts was overruled. In the complaint it was alleged that each of the appellants was a corporation and that

each of them was and had been engaged in the business of furnishing gas for domestic consumption for and about the city of Elwood, Madison county, Indiana, and the vicinity thereof for a long time; that the first two companies named had been so engaged in furnishing natural gas for more than eleven years (this cause having been commenced in June, 1903), "and still have some interest therein, as plaintiff is informed and believes;" that these two companies were organized as separate organizations, but since their organization they had either consolidated or had such an arrangement between themselves as to the distribution of gas to their various customers that they had exchanged lines and gas-pipes, and that the customers of one company were furnished gas through the pipes of the other company; that the exact nature and condition of this arrangement the appellee did not know, and he could not state which line belonged to either company or which company actually furnished gas to the appellee or other customers; that since the organization of these two companies they had pretended to sell, convey and dispose of all their rights, property, and franchises to the other appellant, Citizens Heat & Light Company, and this transfer, if any was made, was made since the execution of the appellee's contract "hereinafter referred to," for the purpose of avoiding the obligation of those companies to the appellee "hereinafter set out," and without consideration and with full knowledge of such obligation, leaving said consolidated companies without assets and insolvent, "and is subject to all the rights and privileges of the plaintiff under said contract so referred to;" that on October 1, 1889, the appellee entered into a written contract with said Elwood Natural Gas & Oil Company, by the terms of which that company was to furnish the appellee with gas in his dwelling for the fuel and light therein "as long as gas exists in said wells or the defendants have a supply thereof, for the consideration of \$50, which consideration the plaintiff says

he paid; that the plaintiff is entitled under his said contract to the use of gas for fuel and light in his residence situated on," etc., describing certain lots in Elwood; that "there is an abundance of gas in the wells and lines and pipes of said defendant companies to furnish him with gas, and that his residence is attached to and connected with the pipe-lines of one or the other or both of the defendants as above stated, he is unable to say which;" that the appellee for many years had been so connected with "the defendants' pipe-lines and wells and has used gas therefrom continually for lighting and heating his residence, and has in all things conformed to the terms of his said contract, and has fully paid for the use of said gas, and that he has his home piped and equipped for the use of natural gas for lighting and heating, and not for other fuel or light, and cannot procure gas or other fuel; that the defendants are now threatening, without any fault of this plaintiff, to turn off the gas from his residence, which they have no right in law or equity to do; and if said gas is so shut off from his dwelling he will suffer irreparable loss and injury for which there is no adequate legal remedy." By further allegations it was sought to show an emergency for the issuing of a restraining order. Prayer for a restraining order and for a perpetual injunction.

It is not attempted to state a cause of action for damages. The appellee is not shown to have suffered any loss or damage, and there is no demand for damages. It was sought only to prevent by injunction the threatened turning or shutting off from the appellee's residence of gas then being supplied by the appellants or one or more of them, it being claimed that the appellee had the right to the continued use of gas by virtue of a certain written contract between him and the Elwood company. There is much indefiniteness and uncertainty in the pleading, with some statements of conclusions of the pleader. It is manifest that it is sought to rely upon the written contract

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above mentioned and prospective conduct operating to constitute a breach thereof. No copy of that contract is set out or exhibited. It is said that it was made in 1889, long before any arrangement is shown to have existed between the Elwood company and either of the other two companies, and that by its terms the Elwood company was to furnish the appellee with gas in his dwelling for fuel and light therein as long as gas exists in "said wells" (not before mentioned in the pleading) or "the defendants" have a supply thereof, for the consideration of \$50, which consideration the appellee paid.

It is for threatened failure to continue to perform this contract that an injunction is sought. The pleading being founded upon a written instrument, the original or a copy thereof should have been filed with the pleading or set out therein. §365 Burns 1901, §362 R. S. 1881. See *Xenia Real Estate Co. v. Macy* (1897), 147 Ind. 568; *Ingle v. Bottoms* (1903), 160 Ind. 73; *Simpson v. Pittsburgh Plate Glass Co.* (1902), 28 Ind. App. 343; *Pickett v. Green* (1889), 120 Ind. 584.

Without passing upon other matters sought to be presented as involved in the loosely-written pleading, we must hold the complaint insufficient on demurrer.

Judgment reversed.

COLLINS COAL COMPANY v. HADLEY,
ADMINISTRATRIX.

[No. 5,466. Filed October 25, 1905. Rehearing denied June 29, 1906. Transfer denied October 12, 1906.]

1. PLEADING.—*Complaint.*—*Master and Servant.*—*Negligence.*—*Mines.*—*Statutes.*—A complaint showing that defendant employed 100 men in its coal mines; that defendant failed to keep on hand a supply of props, caps and timbers to secure the roof of the mines; that its mining boss failed to inspect the rooms oftener than once a week; that it failed to provide a black-

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board on which the miners could register their orders for timber for supporting the roof of the mine and that by reason thereof decedent was killed, states a cause of action under the act of 1891 (Acts 1891, p. 57, §13, §7473 Burns 1901). p. 642.

2. ACTION.—*Death by Wrongful Act.*—*Mines.*—*Statutes.*—*Executors and Administrators.*—Under §7473 Burns 1901, Acts 1891, p. 57, §13, a right of action for the death of a coal miner accrues to the widow, children, adopted children, parents or other dependents, and not to deceased's personal representatives. p. 642.
3. STATUTES.—*Construction.*—*Creating New Rights.*—Statutes creating rights not given by the common law are strictly construed, and the statutory remedies are exclusive. p. 644.
4. PLEADING.—*Complaint.*—*Demurrer for Want of Facts.*—*Plaintiff's Right to Sue.*—A demurrer for want of facts to a complaint properly questions plaintiff's right to sue. p. 645.
5. STATUTES.—*Repeal.*—*Negligence.*—*Death.*—*Right to Sue.*—The act of 1899 (Acts 1899, p. 405, §285 Burns 1901), providing generally that the personal representatives of one whose death was caused by wrongful act may maintain an action therefor, does not repeal §7473 Burns 1901, Acts 1891, p. 57, §13, giving a right of action to the widow, children, parents and dependents of a miner killed in a coal mine because of the owner's violation of the mining laws. *President, etc., v. Bradshaw*, 6 Ind. 146, and *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357, distinguished. pp. 645, 652.
6. SAME.—*Repeal.*—*Implication.*—Repeals by implication are not favored by the courts, and laws will be construed, if possible, so as to avoid such a repeal. p. 646.
7. SAME.—*Repeal.*—*Presumptions.*—The legislature is presumed to know the provisions of prior laws on a subject and to repeal same by the use of express terms, if a repeal is desired. p. 647.
8. SAME.—*Reënactment of Prior.*—*Limiting Statutes.*—A limiting statute, virtually making an exception to a prior general statute, is not repealed by a subsequent general statute reënacting in terms or substance such prior general statute. p. 648.

From Clay Circuit Court; *Presley O. Colliver*, Judge.

Action by Louise Hadley, as administratrix of the estate of Goldie Hadley, deceased, against the Collins Coal Company. From a judgment on a verdict for plaintiff for \$5,000, defendant appeals. *Reversed.*

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Rawley & Hutchison and Henry, Crane & Miller, for appellant.

A. W. Knight, George A. Knight and Jacob Herr, for appellee.

WILEY, C. J.—Appellee brought this action to recover damages resulting from the death of the decedent caused by the alleged negligent acts of appellant. The complaint is in a single paragraph, to which a demurrer for want of facts was overruled. Answer in general denial. Trial by jury, resulting in a general verdict for appellee. Appellant's motion for a new trial overruled, and judgment upon the verdict.

By the assignment of errors, appellant is entitled to have considered the action of the court in overruling the demurrer to the complaint and its motion for a new trial.

The complaint alleges that the appellee was the duly appointed, qualified and acting administratrix of the estate of the decedent; that appellant was a corporation existing under the laws of Indiana, and engaged in mining and shipping coal; that appellant was the owner of a certain coal mine in Clay county, Indiana, and was engaged in working and operating the same; that the coal was reached and worked by means of a shaft sunk from the surface of the earth, and by driving entries through the same, and turning workrooms off from said entries; that on January 5, 1903, appellant had working in said mine 100 men; that the decedent was in its employ as a coal miner, and was engaged in mining coal in one of the rooms in said mine; that it was the duty of appellant to use reasonable care to furnish the deceased with a reasonably safe place to work, and to protect him therein, and to that end it was the duty of appellant to keep constantly on hand at its said mine a sufficient supply of timbers, and to deliver at the working place all props, caps, and timbers, so that decedent might be able properly to secure his room from caving in;

that it was the further duty of appellant's bank boss to visit and examine each and every working place in the mine at least every alternate day when the miners were at work, and to examine and see that each and every working place was properly secured by props or timbers, and that safety was in all respects assured, and to see that a sufficient supply of props, caps, and timbers was always on hand at decedent's said room or working place, in order that the same might be propped and made secure and safe; that it was the further duty of appellant to place a blackboard, sufficiently large, with the number thereon of every workman employed in the mine, at the most convenient place near the entries, to be used by the workmen in registering thereon such timber as might be required from day to day to make secure their working places.

It is further averred that appellant did not perform its duty in the particulars set forth, but wholly failed and neglected so to do in this, to wit, that it did not keep constantly on hand a sufficient supply of timber of proper length, and deliver to said working place of decedent props, caps, and timbers of proper length when needed and required by decedent, so that he might properly secure said room and working place from caving in; but, on the contrary, it negligently and carelessly refused and neglected to deliver the necessary caps, props and timbers, although requested often by him so to do. It is next alleged that appellant carelessly failed, by its bank boss, to visit and examine the working place at least every alternate day, to see that the same was properly secured by props, etc., and that safety to the miners was in all respects assured, and to see that a sufficient supply of props, etc., was always on hand; that, on the contrary, it did not, by its said bank boss, visit said working place more than once a week, and negligently and carelessly permitted the same to remain without props, caps, and timbers, so that by reason thereof the decedent

was unable properly to prop and secure the room and working place in which he was engaged.

It is further averred that appellant negligently and carelessly failed to have and place a blackboard of any kind or character at the most convenient place near the mine entries, whereon the workmen could register their wants for timbers, and that decedent was compelled orally to make such requisition for said timbers that he needed or required; that by reason of such failures, all of which were well known to appellant, or might have been by the use of reasonable diligence, said roof of the room in which decedent was working suddenly gave way, caved in, and fell upon him, thereby inflicting injuries which resulted in his death; that decedent's death occurred wholly by the fault and negligence of the appellant, as herein alleged, and while the decedent was in the exercise of due care and caution, and without any fault or negligence on his part, or the part of appellee.

It is then averred that prior to said accident there was nothing in the appearance of said roof to indicate immediate danger, and no evidence thereof was discoverable by the usual and ordinary tests, which had been made from time to time, and that said roof could and would have been made perfectly safe by decedent but for the negligence of appellant, as herein alleged. It is then alleged that if appellant had performed its duty and had, by its bank boss, visited said working place of decedent, and had seen that safety was in all respects assured, and that timber, props, and caps were always on hand when needed and required, said injury would not have occurred; that had appellant furnished the decedent with timber, caps, and props, as was its duty, decedent could and would have propped and secured the roof so that the same would not have caved in and fallen upon him. It is then averred that the decedent left surviving him the appel-

lee, who is his widow, and two minor children, and that this action is prosecuted for their benefit.

The first question discussed by counsel is the sufficiency of the complaint, and it is most earnestly contended that it is apparent upon the face of the complaint that

1. the appellee, as administratrix, cannot maintain this action. Appellee bases her right of action upon the failure of appellant to perform certain duties specifically enjoined upon it by statute. This statute, commonly known as the "mining act," requires a mine operator, where more than ten men are employed, to keep on hand constantly a sufficient supply of props, caps and timbers, so that workmen may at all times properly secure the roofs of the mining rooms from caving in; also that the mining boss shall visit and examine each working place in the mine at least every alternate day to see that such places are securely propped and safe for workmen, and to see that a sufficient supply of props, caps, and timbers is on hands, etc. And it further requires that such operator, etc., shall have and place a blackboard at the most convenient place near the mine entrance, upon which workmen may register requests for such timber as may be required to secure their working places. §§7466, 7472 Burns 1901, Acts 1893, p. 147, Acts 1897, p. 168, §4. The complaint charges in definite terms the violation on the part of appellant of all these four requirements of the statute, and if appellee, as administratrix, can maintain the action, the complaint is not subject to a successful attack of the demurrer.

Section thirteen of the act of June 3, 1891 (Acts 1891, p. 57, §7473 Burns 1901), is as follows: "That for any injury

- to person or persons or property occasioned by any
2. violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action

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shall accrue to the widow, children, or adopted children, or to the parents or parent, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for like recovery for damages for the injury sustained by reason of such loss of life or lives." This statute, in case of death of an employe in a coal mine, vests the right of action in the surviving widow or children of the decedent, and not in his administrator or administratrix, and it has been held both by the Supreme Court and this Court that a personal representative of the decedent cannot maintain the action.

Maule Coal Co. v. Partenheimer (1900), 155 Ind. 100, and authorities there cited. See, also, *Boyd v. Brazil Block Coal Co.* (1900), 25 Ind. App. 157; *L. T. Dickason Coal Co. v. Unverferth* (1903), 30 Ind. App. 546.

The case of *Couchman v. Prather* (1904), 162 Ind. 250, is instructive here. There, appellant, as administrator, brought an action against a saloon-keeper and his bondsmen for a violation of the liquor law prohibiting sales of liquor to a person in an intoxicated state, and the complaint alleged such sales, and that, as a result thereof, the decedent became so intoxicated as to be unconscious of his condition, and while in that condition attempted to drive in a buggy to his home, and while so doing he fell out of the buggy, breaking his neck, etc.

Section 7288 Burns 1901, §5223 R. S. 1881, provides: "Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act shall be personally liable, and also liable on his bond filed in the auditor's office, * * * to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

It was urged by appellant in that case that the action was prosecuted under §285 Burns 1901, Acts 1899, p. 405,

which confers upon the personal representative of a

3. decedent, whose death was caused by the wrongful act or omission of another, to prosecute an action to recover damages for causing such death. In deciding the case the Supreme Court used the following language: "A statute giving a remedy which did not exist at common law, not only speaks affirmatively, but it also speaks negatively. In such circumstances the maxim *expressio unius est exclusio alterius* has a particular application. Sutherland, Stat. Constr., §325. So far as a remedy by way of damages is concerned, the rule is that when a new right is conferred by statute, and an adequate provision for its enforcement is therein made, the statutory remedy is exclusive. *Storms v. Stevens* [1885], 104 Ind. 46; Sedgwick, Stat. and Const. Law, 94; Endlich, Interp. of Stat., §465; Sutherland, Stat. Constr., §399."

In *Storms v. Stevens*, *supra*, it was said: "Where a statute creates a new right and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all other remedies. Such has been the settled law in this State for more than sixty years, and such is the law elsewhere."

In *Couchman v. Prather*, *supra*, it was said: "Complications would arise from the holding that, in the circumstances of a case like this, suit could be maintained under §285, *supra*. It would result in the action's being instituted and controlled by a statutory trustee, instead of by the person injured in his means of support, in his individual capacity, as contemplated by §7288, *supra*." In this State it is no longer a question of legitimate debate that where a special statute gives a right of action to a designated class or classes of persons, they, and they alone, can maintain such action.

The demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action

- properly questions the right of the plaintiff therein
4. to maintain such action. *Boyd v. Brazil Block Coal Co., supra.*

Counsel for appellee seek to avoid the rule established by the cases cited, upon the ground that §285, *supra*, repeals §7473, *supra*, "as to the person who shall

5. bring the action." Without entering into a discussion of the question thus raised, we are clearly of the opinion that the position assumed by counsel is not tenable. As the personal representative of the decedent in this case has no right under the statute to prosecute the action, the demurrer to the complaint should have been sustained.

The judgment is reversed, with directions to the trial court to sustain appellant's demurrer to the complaint.

ON PETITION FOR REHEARING.

WILEY, J.—Appellee has asked for a rehearing and has supported her petition therefor by an able and ingenious brief. While several reasons are assigned, they are all included in the single question decided in the original opinion, viz: That under the facts stated in the complaint the right of action was in the widow of decedent and not in his personal representative.

It is urged that the action was rightly brought in the name of the administratrix, for the reason that section thirteen of the mining act (Acts 1891, p. 57, §7473

5. Burns 1901) "was modified by the later-enacted general statute of 1899 (Acts 1899, p. 405, §285 Burns 1901), which conferred the right of action for death by wrongful act upon the personal representative."

It is insisted that under the amended act of 1899, *supra*, a right of action where death results from the "wrongful act or omission" of one, is lodged solely in the personal representative of the decedent. If this is true, the amended act repeals, by implication, §7473, *supra*, which gives the

right to the widow "or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed," etc.

If the latter section is repealed, then we were in error in holding that the administratrix could not maintain this action. Prior to the reenactment in 1899 of the general statute giving a right of action for the death of a person caused by the wrongful act or omission of another, the damages recoverable inured "to the exclusive benefit of the widow and children, if any, or next of kin," etc. The only change made by the amendatory act of 1899, *supra*, was by adding the words "or widower (as the case may be)."

It seems clear that the purpose of the amendatory act was to extend the provisions of the statute to the widower, by making him a beneficiary thereunder. It is evi-

6. dent, from the words employed, that it was not the intention of the legislature to repeal section thirteen of the mining act. So, if the latter section was repealed, it was by implication. Repeals by implication are not favored.

In *Board, etc., v. Garty* (1903), 161 Ind. 464, it was said: "It is a familiar rule, and one universally affirmed by the authorities, that a repeal by implication is not favored. In accordance with this rule, two or more acts on the same subject must, if possible, be so construed that both may be permitted to stand. It has been repeatedly affirmed by decisions of this court that implied repeals are only recognized and upheld when the later act is so repugnant to the earlier as to render the repugnancy or conflict between them irreconcilable. A court will always, if possible, adopt that construction which, under the particular circumstances in a given case, will permit both laws to stand and be operative."

In 1 Lewis's *Sutherland*, Stat. Constr. (2d ed.), §247, it is said: "When some office or function can by fair construction be assigned to both acts, and they confer different

powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject.' *Woods v. Board, etc.* [1893], 136 N. Y. 403, 32 N. E. 1011. * * * 'The earliest statute continues in force unless the two are clearly inconsistent with and repugnant to each other, or unless in the later statute some express notice is taken of the former plainly indicating an intention to repeal it; and where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication.' *People, ex rel., v. Raymond* [1900], 186 Ill. 407, 57 N. E. 1066. These expressions of opinion are supported by numerous cases."

In 1 Lewis's *Sutherland, Stat. Constr.* (2d ed.), §267, the author says: "If, by fair and reasonable interpretation, acts which are seemingly incompatible or con-

7. tradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. * * * The act being silent as to repeal and affirmative, it will not be held to abrogate any prior law which can reasonably and justly operate without antagonism. A statute which does not take away any right, or impose any substantially new duty, but regulates with additional requirements a duty imposed by a previous statute, is not to be deemed inconsistent with the previous act. Two statutes are not repugnant to each other unless they relate to the same subject and are passed for the same purpose. 'It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and

that the legislature does not intend to repeal a statute without so declaring.' ”

In 1 Lewis's Sutherland, Stat. Constr. (2d ed.), §273, is found the following: “ ‘A fair law which is merely a reënactment of a former does not repeal an inter-

8. mediate act which has qualified or limited the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first.’ This is especially true if the intermediate law is special or particular and the reënacted law is a general law on the same subject. * * * Where a law is substantially reënacted it is said to show that the legislature did not regard it as repugnant to an intermediate act to some extent covering the same subject.” These declarations of the law, applicable to repeals, are abundantly sustained by the authorities, of which we cite the following: *Powell v. King* (1899), 78 Minn. 83, 80 N. W. 850; *State, ex rel., v. Commissioners, etc.* (1890), 21 Nev. 19, 23 Pac. 935; *Township of Harrison v. Board, etc.* (1898), 117 Mich. 215, 75 N. W. 456; *Coöperative Sav., etc., Assn. v. Fawick* (1899), 11 S. Dak. 589, 79 N. W. 847; *Small v. Lutz* (1902), 41 Ore. 570, 67 Pac. 421, 69 Pac. 825; *Bentley v. Adams* (1896), 92 Wis. 386, 66 N. W. 505; *State, ex rel., v. Beard* (1892), 21 Nev. 218, 29 Pac. 531; *State, ex rel., v. Mayor, etc.* (1894), 57 N. J. L. 298, 30 Atl. 543; *Oleson v. Haritwen* (1893), 57 Fed. 845, 6 C. C. A. 608; *People v. Wenzel* (1895), 105 Mich. 70, 62 N. W. 1038; *Curbay v. Bellemere* (1888), 70 Mich. 106, 37 N. W. 911; *Gazollo v. McCann* (1895), 63 Mo. App. 414; *Lynch v. Chase* (1895), 55 Kan. 367, 40 Pac. 666; *Blain v. Bailey* (1865), 25 Ind. 165; *Blumenthal v. Tibbits* (1903), 160 Ind. 70.

In the last case cited it was insisted that section seventeen of the act approved March 7, 1883 (Acts 1883, p. 151, §2484 Burns 1901), amending the decedent's act, repealed §802 Burns 1901, §790 R. S. 1881, of the civil

code, but the court held otherwise, and in the opinion said: "It is true that §2484, *supra*, was enacted in 1883, while §802, *supra*, was enacted in 1881, but §2484 is substantially a reënactment of §151 of the decedent's act, enacted in 1881 (Acts 1881, p. 423), and the presumption against a repeal under such circumstances is especially strong."

In 1852 the legislature passed two laws, one of which was special, exempting farm lands lying within the corporate limits of cities from municipal taxation, and the other general, giving cities power to collect an *ad valorem* tax on all property within their corporate limits. In 1857 the latter act was amended, but the section conferring power upon cities to collect taxes on "all property within such city" was reënacted in precisely the same language.

In *Blain v. Bailey, supra*, the question involved was whether the act of 1857 repealed by implication the special act of 1852, exempting farm lands within the corporate limits of a city from taxation. It was held that the special act was not repealed, and in the decision the court employed the following language: "While these two acts continued in force they were, by the settled rules of construction, to be so interpreted that both could have effect. This could be done by holding the particular cases mentioned in the exempting act to constitute exceptions to the general provisions of the other act, and we are not aware that any doubt was entertained upon that subject at that time. Now we cannot suppose that the legislature, by reënacting a provision in the same language which was employed in a repealed statute, intended to impart to it a wider scope, or other meaning, than that which the same words were previously intended to import, especially when the effect would be to accomplish what is not favored in the law—the repeal of another statute by implication. It is more reasonable to hold that the words have been employed in the same sense in which they had been used in the act repealed.

* * * The position that it was not intended to repeal

the act in question is strongly confirmed by the fact that the act of 1857 (section one) expressly repeals several acts which would undoubtedly have been repealed by it by implication, but is entirely silent as to this act. Why was this? The legislature must be presumed to have acted with deliberation, and with a full knowledge of all existing acts upon the same subject. * * * Again, the forty-second section of the act of 1857 is a general statute, without negative words, while the exempting act of 1852 is particular. In such a case the rule is that there is no repeal by implication, unless it is absolutely necessary in order that the later act shall have any meaning at all." Citing Dwaris, Statutes, *675; Sedgwick, Stat. and Const. Law, 123; *Williams v. Pritchard* (1790), 4 T. R. 2.

Endlich, Interp. of Stat., §370, says: "It is scarcely necessary to remark, that, where the same language, which has received a certain judicial construction in an act, is used in an act amendatory of the same, it is to be presumed to have been used there in the same sense, and intended to be subject to the same construction."

It is past understanding that the words "wrongful act or omission of another" in the act of 1899, *supra*, should have a wider scope, or a different meaning than they were construed to have had in the repealed statute. As we have seen, the amendatory act is a reenactment of the old statute, in precisely the same language, adding thereto the words, "or widower (as the case may be)."

In 1852 the Illinois legislature passed a law giving a right of action for the death of a person by "wrongful act," etc., and provided that the action should be brought by the personal representative "of such deceased person." This statute is substantially like §285 Burns 1901, Acts 1899, p. 405, except it does not include the widower, as a beneficiary. In 1874 the statute in its original form was reenacted. R. L. of Illinois (1874), Chap. 70, p. 582.

In 1872 the Illinois legislature passed a law relating to mines, miners, etc. Acts 1871-2, p. 568. Section fourteen of that act gave a right of action for death, resulting from any "wilful violations of this act, or wilful failure to comply with any of its provisions," and lodged such right of action in "the widow of the person so killed, or his lineal heirs or adopted children * * * dependent for support on the person or persons so killed."

In *Litchfield Coal Co. v. Taylor* (1876), 81 Ill. 590, the identical question involved here was presented for decision. In that case the action was commenced in the name of the administrator of the decedent. Subsequently the court permitted the declaration and summons to be amended by substituting the widow as plaintiff. There, as here, it was contended that the reenactment of the general statute in 1874 repealed by implication section fourteen of the mining act, and hence the action could only be prosecuted in the name of the personal representative. In the course of the decision the court said: "We are satisfied the widow was the proper person to bring the action. The fourteenth section of the act expressly authorizes her to bring the suit. Chapter 70, entitled 'Injuries,' R. L. 1874, p. 582, which authorizes an action in the name of the personal representatives, did not repeal the fourteenth section of the act entitled 'Miners.' The former act is general, while the act in relation to miners may be regarded as special, and the latter must control as to all cases specially enumerated in the act itself, while the other act, being general, would embrace all other cases." Citing *Town of Ottawa v. County of La Salle* (1851), 12 Ill. 339.

While decided cases in other jurisdictions are not authorities binding upon courts in this jurisdiction, they are worthy of our consideration, and we are at liberty to follow them if we believe they properly declare the law. The case last cited is, we believe, a correct declaration of the law, and is in harmony with the general rule announced in the

original opinion, and supported by the great weight of authority.

Counsel for appellee seek to parry the force of the decision in *Couchman v. Prather* (1904), 162 Ind. 250, cited in the original opinion, by saying that "it is not in point." We cannot agree with counsel, but on the contrary regard the question there involved and decided directly in point. The facts upon which that case rested are so fully stated in the original opinion that we will not advert to them farther.

Counsel for appellee rely largely upon two cases—*President, etc., v. Bradshaw* (1855), 6 Ind. 146, and *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357—in sup-

5. port of their contention that the amendatory act of 1899 (§285 Burns 1901, Acts 1899, p. 405) repealed section fourteen of the mining act (§7473 Burns 1901, Acts 1891, p. 57), and by reason thereof urge that the amendatory act governs.

In the case of *President, etc., v. Bradshaw, supra*, two statutes passed at the same session of the legislature were involved. These two statutes were upon the same subject-matter, and the question was: Did the latter repeal, by implication, the former? The substance of the first statute was that whenever any person should die from injuries happening through the negligence of a railroad company, a right of action for damages should exist in favor of certain specified persons against such company. One of the beneficiaries named in this statute was the wife of the person so killed. 1 R. S. 1852, p. 426, §3. Such right of action was limited by this statute against railroad companies. Thirty-eight days later the legislature extended this right, making it general against all persons, natural and artificial, annexing, however, some modifications and limitations upon its exercise. 2 R. S. 1852, p. 205, §784.

This later act is identical with §285, *supra*, except that it limited the recovery to \$5,000, and the "widower" was

not named as a beneficiary. In considering the case the court said: "The two acts quoted are upon the same subject-matter, that is, they both create a right of action in a successor, to be pursued by the same system of practice, in the same tribunals, for a tort committed upon a deceased person, and they must be considered together. The first, as we have said, gives the right of action in such cases against a railroad company; the second, against all persons. The first does not regard the question whether the deceased, if living, could have maintained the action for the same tort; the second does. The first gives the right of action to the widow or other relatives, as the case may happen, and gives the judgment recovered exclusively to the plaintiff in the suit; the second vests the right of action in the legal representative of the deceased, and requires the proceeds of the judgment recovered to be distributed to the widow and heirs, according to the general law of distribution of personal estate. The first makes no provision for the brothers and sisters and remoter relatives of a deceased miner killed upon a railroad; the second does. The first does not limit the time in which suit may be brought; the second does. The first does not limit the amount of damages that may be recovered; the second does. The second is more comprehensive than the first, covering the whole ground occupied by it, and more. The two are utterly inconsistent in their provisions and cannot both be enforced; the latter is much the more reasonable and judicious law, is more in harmony with general principles, furnishes an ample remedy, and, we think, repeals the former."

Counsel for appellee say that "no distinction can be drawn between the above case and the one at bar." There is a clear and marked distinction. In the case of *President, etc., v. Bradshaw, supra*, the court had under consideration two statutes passed at the same session of the legislature, and both acts related to the same subject-matter. In the case we are considering the two statutes are essentially different.

Section 7473, *supra*, created a new right of action growing out of violations of the mining act, and made ample provision for asserting and enforcing such new right, and designated the persons who became beneficiaries thereunder.

The amendatory act of 1899, *supra*, supplies a general procedure, by vesting in the personal representative of a decedent, who died from the wrongful act or omission of another, where such act or omission is made wrongful by statute, provided such statute makes no provision for its enforcement, or where an action is founded upon an act which created a common-law right of action.

Neither is the case of *Pittsburgh, etc., R. Co. v. Burton*, *supra*, in point, which will readily appear from a reference to the question there involved.

In 1879 the legislature passed a law requiring that engine whistles on locomotives should be sounded distinctly three times, not less than eighty rods from any highway crossing, and bells be rung continuously, etc. The same act provided that damages might be recovered for injuries or death resulting from a violation of the duties imposed, and provided that in case of death the recovery should be limited to \$5,000. Acts 1879, p. 173, §4020 *et seq.* R. S. 1881. In 1881 the general act providing for the recovery of damages for "the wrongful act or omission of another" was amended, fixing the amount of recovery at \$10,000, instead of \$5,000. Acts 1881, p. 240, §284 R. S. 1881. It was held that the limiting clause of section four of the act of 1879, *supra*, fixing the amount of recovery at \$5,000, was repealed by the amendatory act of 1881, *supra*.

It is our conclusion that the original opinion is not in conflict with the rules declared in the two cases we have just reviewed, but, on the contrary, is in harmony with the great weight of authority.

Petition for rehearing overruled.

PIERSE v. BRONNENBERG ET AL., ADMINISTRATORS.

[No. 5,831. Filed October 23, 1906.]

1. **APPEAL AND ERROR.**—*Parties.*—*Decedents' Estates.*—*Assignment of Errors.*—An assignment of errors naming "Estate of Frederick Bronnenberg, deceased," as appellee, is insufficient. p. 656.
2. **SAME.**—*Assignment of Errors.*—*Amendment.*—*Dismissal.*—An assignment of errors naming an estate as appellee may be amended upon motion where appellees filed a brief on the merits and subsequently moved to dismiss the appeal, the appellant immediately after the making of such motion asking leave to amend. p. 657.

From Madison Circuit Court; *Vinson Carter*, Special Judge.

Action by Eldon B. Pierse against Calvin A. Bronnenberg and another, as administrators of the estate of Frederick Bronnenberg, deceased. From a judgment for defendant, plaintiff appeals. On motion to dismiss the appeal and for leave to amend assignment of errors. (For decision on merits, see — Ind. App. —.) *Motion to dismiss overruled and motion for leave to amend granted.*

Patrick J. Casey and *Kittinger & Diven*, for appellant.
Bagot & Bagot, for appellees.

ROBINSON, C. J.—On motion to dismiss and for leave to amend assignment of errors.

The record shows that appellant filed in the office of the clerk of the Madison Circuit Court his claim against the estate of Frederick Bronnenberg, deceased. The claim not having been allowed by the duly qualified and acting administrators of the estate, the same was placed on the appearance docket. Afterwards, Calvin A. Bronnenberg, as one of the administrators of the estate, filed an affidavit for a change of venue from the county and the cause was sent to Delaware county. In the Delaware Circuit Court

the administrators, Calvin A. and Ransom Bronnenberg, demurred to the claim. The cause seems to have been carried along on the docket as Eldon B. Pierse v. Estate of Frederick Bronnenberg. By agreement the cause was certified back to the Madison Circuit Court, and Calvin A. Bronnenberg, as one of the administrators, made affidavit for change of judge, and a special judge was appointed to try the cause. Upon a trial the court made a special finding of the facts. The findings say nothing about any administrators having been appointed, but do state that Frederick Bronnenberg died in June, 1901. Among the conclusions of law it was stated that the claimant was not entitled to recover anything on his claim. Judgment was rendered July 8, 1905. The assignment of errors begins: "Eldon B. Pierse, appellant, v. Estate of Frederick Bronnenberg, deceased, appellee."

The record was filed in this court August, 1905, and appellant's brief, on November 6, 1905. On November 21, 1905, the attorneys who represented the estate and the administrators in the trial court filed a brief on the merits of the case in this court as "attorneys for appellee." On August 31, 1906, appellee filed a motion to dismiss the appeal on the grounds that the assignment of errors does not contain the full names of all the parties, and does not contain or purport to contain the name of any appellee. On September 8, 1906, appellant filed a motion for leave to amend the assignment of errors by making "Calvin A. Bronnenberg and Ransom Bronnenberg administrators of the estate of Frederick Bronnenberg, deceased," appellees.

It is clear that the assignment of errors is defective. But it clearly appears from the record that there were administrators of the estate, and, representing the

1. estate, through their attorneys, they have entered their appearance in this court, and filed a brief upon the merits of the case. Appellant and the estate only

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will be affected by either an affirmance or a reversal
2. of the judgment. If the names of the administrators are put in the assignment as representing the estate, an affirmance or a reversal of the judgment will have the same effect it would have without such amendment. We think the reasoning in *McConahey v. Foster* (1899), 21 Ind. App. 416, and cases there cited, is applicable to the question here presented, and upon the authority of that case the motion to dismiss is overruled, and the motion to amend the assignment of errors is granted.

GRAND RAPIDS & INDIANA RAILWAY COMPANY ET AL. v. RAILROAD COMMISSION OF INDIANA.

[No. 3 Railroad Commission. Filed June 29, 1906. Transfer denied October 23, 1906.]

1. **APPEAL AND ERROR.—*Railroad Commission.—Rates.***—An appeal, under the railroad commission act (Acts 1905, p. 83, §6) to the Appellate Court can be taken only in cases where a party is dissatisfied with “any rate, classification, rule, charge or general regulation made, approved, adopted or ordered by the commission.” p. 658.
2. **SAME.—*Railroad Crossings.—Railroad Commission.***—An appeal lies from an order of the railroad commission respecting the crossing of one railroad by another to the proper circuit or superior court, and then to the Appellate Court, but not to the Appellate Court in the first instance. p. 658.
3. **RAILROADS.—*Interlocking Devices.—Railroad Commission.—Appeal and Error.***—The railroad commission act (Acts 1905, p. 83) vests in such commission the authority theretofore vested in the Auditor of State in reference to interlocking devices, and whether an appeal lies from an order concerning such must be determined from such act. p. 658.

From Railroad Commission of Indiana; *Union B. Hunt*, Chairman, *William J. Wood* and *Charles V. McAdams*, Commissioners.

Grand Rapids, etc., R. Co. v. Railroad Com., etc.—38 Ind. App. 657.

Petition by the Chicago & Erie Railroad Company against the Grand Rapids & Indiana Railway Company. From an order for petitioner, defendant and another appeal. (For denial of petition to transfer to Supreme Court, see 167 Ind. 214.) *Appeal dismissed.*

G. E. Ross and J. H. Campbell, for appellants.

C. V. McAdams, for the commission.

ROBINSON, C. J.—The Chicago & Erie Railroad Company filed its petition with the railroad commission against appellants, to require the construction, maintenance and operation of an interlocking device at a crossing. The commission found in favor of the petitioner. From the order thus made by the commission, appellants have appealed to this court.

Under section six of the railroad commission act (Acts 1905, p. 83, §5405f Burns 1905), an appeal direct to this court is authorized only where the party in interest

1. is dissatisfied with "any rate, classification, rule, charge, or general regulation made, approved, adopted or ordered by the commission." If the party in interest be dissatisfied with any order or regulation of the commission "respecting the location or construction

2. of sidings, switches or connections between railroads, or the crossing of one railroad by another, or the transfer and switching of cars at junction points, or the regulation of private tracks," an appeal may be taken to the circuit or superior court of the particular county, and from the action of that court in the matter an appeal to the Appellate Court is authorized. As to the installation and maintenance of interlocking appliances the act

3. vests in the commission the authority theretofore vested in the Auditor of State. That is, the statute that vested this authority in the auditor must be looked to to determine the duties and authority of the commission in relation to interlocking appliances at crossings.

Whether an appeal will lie to any court from the action of the commission in installing an interlocking appliance, we need not determine. But it is apparent from the whole act that an order of the commission installing such appliance does not come within the duties exercised by the commission as to a "rate, classification, rule, charge, or general regulation," from which alone appeals to this court are authorized.

Appeal dismissed.

WEST v. WEST.

[No. 5,833. Filed October 24, 1906.]

1. **DIVORCE.—Residence.—Jurisdiction.—Statutes.**—Under §1043 Burns 1901, §1031 R. S. 1881, it is necessary, in order to give the court jurisdiction to decree a divorce, that the residence of the plaintiff within the State for at least two years previous to the filing of the petition shall be established by two witnesses who are freeholders and householders of the State. p. 660.
2. **SAME.—Residence.—New Trial.—Evidence.—Sufficiency.**—Where the plaintiff in a divorce suit proved by one of her witnesses as to residence, that she had been a resident for two years prior to the trial, and not two years prior to the filing of her petition, the evidence is insufficient. p. 660.

From Decatur Circuit Court; *Marshall Hacker*, Judge.

Suit by Nettie West against Charles West. From a decree for defendant, plaintiff appeals. *Affirmed.*

Hugh Wickens and *John E. Osborn*, for appellant.

John W. Craig, Prosecuting Attorney, for appellee.

COMSTOCK, P. J.—Suit for divorce. Appellee, defendant below, did not appear, and was defaulted. The prosecuting attorney appeared on behalf of the State and answered the complaint by general denial. The trial resulted in a decree in behalf of appellee. The overruling of appellant's motion for a new trial is the only error assigned,

and the only cause set out in the motion for a new trial. The cause is that the decision of the court is not sustained by sufficient evidence.

It is insisted by the prosecuting attorney that the residence of appellant is not shown as required by the statute.

Section 1043 Burns 1901, §1031 R. S. 1881, re-

1. quires that the *bona fide* residence within the State of the petitioner, for at least two years previous to the filing of the petition, shall be proved to the satisfaction of the court trying the case, by at least two witnesses who are resident freeholders and householders of the State. Said proof is a prerequisite to the jurisdiction of the court. *Cummins v. Cummins* (1903), 30 Ind. App. 671; *Driver v. Driver* (1899), 153 Ind. 88; *Rosniakowski v. Rosniakowski* (1904), 34 Ind. App. 128.

The evidence is in the record. It appears that two witnesses, possessing the prescribed qualifications, testified to appellant's residence. The evidence of the one

2. showed that the appellant had resided in the State for the two years previous to the filing of the petition, and the other—Doctor Burrows—after testifying that he was a freeholder and householder residing in Decatur county, Indiana, testified, so far as relates to the residence of appellant, as follows:

“Doctor, if you are acquainted with Mrs. Nettie West, you may so state to the court. A. Yes, sir; I am. If she has been a resident of the State of Indiana for the two years last past continuously, you may state to the court. A. Yes, sir; she has. You may state to the court whether she has been a resident of Decatur county during all of that time. A. Yes, sir. Do you know where she has resided for the last two years, doctor? A. Well, for the last two years she has been in Westport and here. Greensburg? A. Yes, sir. These places, Westport and Greensburg, are in this county, doctor? A. Yes, sir. And during all of that time, for the last two years, she has been a resi-

Cromer v. City of Logansport—38 Ind. App. 661.

dent of this county—Decatur county—and this State? A. During all of that time. What has been her acquaintance with you, doctor—for how long? A. Well, I have known her for the past six or eight years, I think. You say you have known her for the past six or eight years? A. Yes, sir. Did you visit her here since she has been in Greensburg? A. Yes, sir; I have. I have seen her since she has been here in Greensburg and she lived a number of years in the same town I lived in—in Westport. She lived there in the same town a number of years.”

He gave this testimony on February 3, 1905. The petition had then been filed a month before said date. This testimony does not show that appellant had resided in the State continuously for the last two years previous to the filing of the petition, and it was not, therefore, sufficient.

The judgment is affirmed.

CROMER ET AL. v. CITY OF LOGANSPORT.

[No. 6,055. Filed October 24, 1906.]

1. TRIAL. — *Special Findings. — Facts. — Conclusions of Law. — Damages.*—A “conclusion of law” that all of the plaintiffs’ merchandise damaged, as shown in the findings, was injured by reason of plaintiffs’ placing it on the ground floor where they knew it would be damaged; that plaintiffs failed to use reasonable care in the prevention of such injury and that their subsequent negligence in failing to use such due care was the proximate cause of the injury, is in reality a finding of a fact. p. 667.
2. PLEADING. — *Complaint. — Amendment. — Refusal. — Harmless Error.*—It is harmless error to refuse an amendment to a paragraph of complaint where the relief sought by the amendment was granted under another paragraph. p. 668.

3. **MUNICIPAL CORPORATIONS.**—*Waters and Watercourses.*—*Collection and Discharge.*—*Damages.*—*Injunction.*—A municipal corporation is liable in damages for, and may be enjoined from, the collection of surface-waters and the discharge of same upon plaintiffs' lots to their damage. p. 668.
4. **DAMAGES.**—*Aggravation of, by Injured Party.*—*Mitigation.*—*Evidence.*—A person injured by the negligence of another must use reasonable care to prevent the increase of damages caused thereby, the failure to use such care being matter in mitigation. pp. 669, 670.
5. **NEGLIGENCE.**—*Contributory.*—*Mitigation.*—*Defense.*—Contributory negligence, when a proximate cause in an action for negligence, bars any recovery whatever; but where it only contributes to the aggravation of injuries after they are suffered, it becomes a matter in mitigation of damages only. p. 669.
6. **DAMAGES.**—*Aggravation.*—*Contracts.*—*Torts.*—The rule that plaintiffs must use reasonable care to prevent any increase in damages caused by defendant's negligence, applies to actions on contract as well as in tort; and damages so caused must be borne by plaintiffs. p. 669.
7. **SAME.**—*Aggravation.*—*Avoidance of.*—*Expenses.*—*Costs.*—Reasonable expenses laid out to prevent the increase of damages negligently caused by defendant are collectible from defendant. p. 670.
8. **SAME.**—*Measure of.*—*Costs of Repair.*—In some cases the cost of repair of injuries caused by defendant's negligence is the measure of damages, subsequent, increased damages caused by plaintiff's failure to repair being chargeable to plaintiff. p. 670.
9. **SAME.**—*Duty to Avoid Increase.*—*Notice.*—*Knowledge of the injury on the part of plaintiff is necessary in order to establish the duty to avoid an increase of damages negligently caused, there being no requirement that plaintiff shall anticipate injuries, even though they are threatened.* p. 670.
10. **TRIAL.**—*Damages.*—*Aggravation of, by Plaintiff.*—*Defense.*—*Burden of Proof.*—The burden of showing plaintiffs' failure to use ordinary care to avoid the aggravation of damages caused by defendant's negligence, is on defendant. p. 671.
11. **SAME.**—*Municipal Corporations.*—*Waters.*—*Collection and Discharge.*—*Special Findings.*—Special findings, in an action against a municipal corporation for damages for the collection and discharge of water upon plaintiffs' lots, showing that de-

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fendant wrongfully collected and discharged waters upon such lots and caused certain damages; that plaintiffs placed the property injured upon such lots knowing that it would be injured if it remained and that it could have been removed and the damages avoided, are not sufficient for the Appellate Court to determine accurately whether judgment for such damages should have been awarded. p. 671.

12. **TRIAL.—Municipal Corporations.—Waters.—Damages.—Decrease of Rental Values.—Special Findings.—New Trial.**—Where the special findings, in an action against a municipal corporation for damages for the collection and discharge of water upon plaintiffs' lots, show that great and recurring injury was done to such lots for several years; and damages were awarded only for injury to certain personal property upon such lots, a motion for a new trial should be sustained in order that the court could properly find the damages sustained to the lots. p. 672.
13. **INJUNCTION.—Municipal Corporations.—Nuisance.—Waters.—Decree.—Time Granted to Abate.**—A decree entered in March giving eight months to a city to remedy defects in its street grading and guttering so as to prevent the collection and discharge of water upon plaintiffs' lots, is too lenient. p. 672.

From Cass Circuit Court; *John S. Lairy*, Judge.

Suit by Robert Cromer and another against the City of Logansport. From a decree for plaintiffs for less than their claim, they appeal. *Reversed.*

Frank V. Guthrie and *Nelson, Myers & Yarlott*, for appellants.

John W. McGreevy and *McConnell, Jenkins, Jenkins & Stuart*, for appellee.

BLACK, J.—The appellants, as owners of certain real estate in the city of Logansport, sued the appellee to recover damages for injury caused by water which the city by its grading and construction of streets brought to said real estate, for which it failed to provide an outlet, whereby it overflowed the real estate of the appellants, and also to obtain an injunction to prevent the continued recurrence

of such injury, the complaint being filed September 5, 1903.

There were two paragraphs of complaint and an answer in denial. The court rendered a special finding of facts, the appellants excepting to the conclusions of law.

The court found, in substance, that the appellants since March 8, 1897, had been the owners in fee of the real estate in question, upon which they had erected two buildings, in which for the past six years they had conducted the business of manufacturing tiling, and the storage and sale of cement, hay, etc., the business being owned by the appellants and conducted by one of them as manager; that the real estate is a triangular piece of ground, the southwest line of which is 4,800 feet in length, curving with the right of way of a railroad named, the north line extending east and west 420 feet, and the east line extending north and south 256 feet; that on and prior to November 18, 1896, there was a large gravel pit in the western portion of the real estate, extending into West Broadway, a street which extended east and west across the real estate of the appellants, north of the portion thereof on which their said business was conducted.

It was shown that Wilkinson street extended along the east side of said real estate, crossing West Broadway; that twenty years or more before the time of the trial the city established grades of these and a number of other streets named and intersecting alleys, east and north of said real estate, and the same were improved from year to year, by which grades and improvements the water was caused to flow from the streets until it gathered in a body at the corner of Wilkinson and West Broadway, and thence it flowed west along West Broadway, emptying into the gravel pit, the grade and improvement of the last-named street west of Wilkinson street being such as to cause the water so to flow and empty, without injury to the property of the appellants; and the water continued so to flow until the

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winter or spring of 1897 or 1898. It was shown that November 18, 1896, the common council of the city so changed the grade of West Broadway from Wilkinson street as to cause the flow east from the railway to the street last named and to prevent the flow westward of the water accumulating at the crossing of West Broadway and Wilkinson streets, and about five or six years before the trial the city improved the street, sidewalk and gutters to conform to the grade thus changed, by raising the same from Wilkinson street westward, and thereby entirely stopped the flow westward of the water so accumulating at said crossing. The proceedings of the common council were set out, showing its action in this behalf; and it was found that the city, at the time when it changed the grade of West Broadway west of Wilkinson street did not, nor did it afterward, make any provision for the disposition of the water which accumulated at the corner of those two streets, and provided no outlet for its discharge, and never assessed or tendered to the appellants or their grantors any damages by reason of the change in the grade and the flow of the water, nor took any steps to protect the premises of the appellants from the flow of water; "and it is found that the action and proceedings of said city were wrongful." It was found that after the improvement had been made by the city in raising the grade west of Wilkinson street, on West Broadway, ordinary rains of one or two hours' duration caused great accumulation of water at West Broadway and Wilkinson streets, so that the streets, gutters and sidewalks were overflowed, the water sometimes standing a foot deep therein; and the water thus accumulating flowed south on Wilkinson street for half a block to an alley which extended westward from that street across the real estate of the appellants, and thence flowed with great force westward through the alley and on and over the premises of the appellants, spreading over the same and flowing into the buildings thereon, south of the alley, carrying debris and

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sediment of the streets thereon "and causing considerable and severe injury and damage to the plaintiffs' premises and merchandise kept and used in the business. It is found that this injury and damage is a recurring one and liable to occur after ordinary rains of one hour or two hours' duration, and the plaintiffs have frequently complained to the mayor and other officers of the city of the injury thus sustained, and were told in response that the city could do nothing, and were refused any redress." It was found that in the year 1897 the appellants suffered "injury and damage to the stock of merchandise, by reason of the flow of water herein found, in the sum of \$100;" that in the year 1898 they suffered "injury to their personal property in the sum of \$150; that in the year 1899, from like cause, in the sum of \$100; in the year 1900, from like cause, \$200; in 1901, from like cause, \$150; in the year 1902, from like cause, \$250, and in the year 1903, from like cause, \$100; that the cement damaged was in sacks and placed on the cement floor, which was on a level with the surface of plaintiffs' lot; that the cement was so placed by the plaintiffs, knowing that it would be injured if permitted to remain there, and that it could have been removed and damages avoided." It was further found that the lands of the appellants, at the point where the alley discharges the water thereon, is below the grade of Wilkinson street, and the city has failed to furnish any outlet for the water so discharged; that the grade of the railroad where it crosses Wilkinson street (at the south end of the land of the appellants) is twenty-two inches higher than the grade of that street at the alley where the water is discharged upon the property of the appellants; that there is no culvert under the railroad on that street for the purpose of affording an outlet, and before the water could seek an outlet on that street it would be standing twenty-two inches above the grade of that street at the alley where the water is conducted upon the property of the appellants; that at the point

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where the alley discharges the water upon the lands of the appellants, they are practically on a level with the alley, and thence they slope gradually downward to the southwest to the railroad right of way, and the railroad company thirty years before the trial had constructed a culvert under its tracks, on the southwest side of the lands of the appellants, for its own use; and all the water discharged from said alley would pass over and across said lands before it would pass through said culvert; that the railroad embankment forming the southwest boundary line of the property of the appellants is considerably higher than said lands; that in recent years this culvert has become stopped up by reason of the widening by the railroad company of its grade and roadbed, so that the water is impeded in flowing through.

The court stated, as its conclusions of law upon the foregoing facts, that "the law is with the plaintiffs, and I find for the plaintiffs on the first paragraph of complaint, and that their damages be assessed at the sum of \$100, and that the defendant, the city of Logansport, should be perpetually enjoined from permitting the water to flow through said alley on the lands of the plaintiffs."

Afterward the court stated, as "amended conclusions of law," the following: "The court finds as the law that all the merchandise injured and damaged as herein

1. found from the year 1898 to the year 1903, both inclusive, was injured and damaged by reason of the plaintiffs' placing said merchandise upon the ground floor, at the place where the plaintiffs knew before placing the same that the merchandise would be damaged and destroyed, if allowed to remain where it was placed; that plaintiffs failed to use reasonable care, under all the circumstances, to prevent said injury; and that their subsequent negligence and failure to use such care became the proximate cause of the injury."

This expression of afterthought by the court, so far as it contained statements of sufficient definiteness and direct-

ness, constituted a further finding of matter of fact, rather than conclusions of law. The real and effectual conclusions of law were that the plaintiffs under their first paragraph of complaint were entitled to an injunction, and were entitled to recover damages in the sum of \$100, the amount of the damage to merchandise in the year 1897, thus omitting any damages for the subsequent years, in each of which damage in amount stated in the findings was suffered the same in kind as that found to have been suffered in 1897.

At the conclusion of the evidence, and before the rendition of the special findings, the appellants moved in writing to be permitted to amend the second paragraph of

2. their complaint, by inserting therein, at what place was not stated, the words, "without fault or negligence on the part of the plaintiffs." The first paragraph contained a denial of negligence on the part of the appellants, but such an averment was not contained in the second paragraph. The court manifestly regarded and treated the first paragraph, on which it found for the appellants, as sufficient for the recovery of damages for all the injuries found which were not found to be attributable to contributory fault of the appellants. In its finding it treated the first paragraph as being as available in this regard as the second paragraph would have been if the amendment were permitted. So, aside from the consideration of the court's large discretion as to amendments, the appellants practically suffered no detriment from the overruling of this motion.

As to the liability of the city for damages arising from its failure to provide an outlet for the surface-water accumulated through its street improvements from a

3. large extent of territory and brought to one locality, to which without such improvements it would not have come, and as to the right of the landowner to be protected by injunction from future recurrent injury from

such continuing cause, there can be no doubt, and in this appeal by the plaintiffs, in whose favor such remedies were provided by the court, no question as to such right and obligation is made; the purpose of the appeal being solely to seek a determination of the question as to the amount of damages, raised by their exception to the conclusions of law and by their various motions herein mentioned. .

One who has been injured, either in his person or in his property, by the negligence or misconduct of another, is under obligation to do whatever he may do reasona-

4. bly to prevent the increase of damages. His negligence which does not operate to cause the injury, but which merely adds to the damage resulting therefrom, is not a bar to the action, but it will have the effect of diminishing the damages, or go in mitigation thereof. Only such portion of the damages as may be directly attributable to the plaintiff's failure to perform his duty in the premises should be deducted from the damages as a whole.

As a general rule, when contributory negligence constitutes a defense, it is a complete defense to the action and bars a recovery of any amount; but when the negli-

5. gence of the plaintiff contributed, not to cause the injury, but only to aggravate it, the injury produced by the plaintiff's negligence being separable from that produced by the defendant's wrong, the defendant should be held liable only for such portion of the entire damage as was produced by his negligence. The rule is applicable both in contract and in tort. The duty

6. of using ordinary and reasonable care and diligence and making reasonable expenditures within his ability rests upon a person injured by another's tort or breach of contract; and so far as the injury is unnecessarily enhanced by the negligence or wilfulness of the injured party, the damages which might have been avoided by the performance of his duty in this respect will fall to him to bear. Where the performance of the injured party of such

duty of cutting down the damages involves labor or

7. expense, the party responsible for the injury is chargeable with such reasonable cost. In some cases the amount of the reasonable expense, not actually incurred, of restoring the loss originally, will measure the recovery of the injured party, though, by reason of

8. delay, such expense has increased; as, where a defendant had obstructed the plaintiff's drain, and the plaintiff could have indemnified himself for \$25, but by delay in making repairs the damages amounted to \$100, it was held that the plaintiff could recover only \$25. *Lloyd v. Jones* (1888), 60 Vt. 288, 13 Atl. 638.

Knowledge on the part of the injured party is an important and necessary element of his responsibility in this regard. He is not required to anticipate that the

9. wrong will be committed, even though it has been threatened by the wrongdoer, or to forego the lawful use of his premises. It is sufficient for the injured party to exercise ordinary care and diligence in preserving his property after he has knowledge of the wrong.

There are very many cases illustrating and applying the rule relating to the duty of the injured party to exercise in good faith ordinary and reasonable care and dili-

4. gence to reduce the damages. Among them are the following: *Chase v. New York Cent. R. Co.* (1857), 24 Barb. 273; *O'Neill v. New York, etc., R. Co.* (1887), 45 Hun 458; *Gilbert v. Kennedy* (1871), 22 Mich. 117; *Hopkins v. Sanford* (1879), 41 Mich. 243, 2 N. W. 39; *Wright v. Illinois, etc., Tel. Co.* (1866), 20 Iowa 195; *Simpson v. City of Keokuk* (1872), 34 Iowa 568; *Allender v. Chicago, etc., R. Co.* (1873), 37 Iowa 264; *Davis v. Fish* (1848), 1 G. Greene (Iowa) 406, 48 Am. Dec. 387; *Douglass v. Stephens* (1853), 18 Mo. 362; *Sherman Center Town Co. v. Leonard* (1891), 46 Kan. 354, 26 Pac. 717, 26 Am. St. 101; *Cargill v. Thompson* (1894), 57 Minn. 534, 59 N. W. 638; *Reynolds v. Chand-*

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ler River Co. (1857), 43 Me. 513; *Sutherland v. Wyer* (1877), 67 Me. 64; *Plummer v. Penobscot Lumbering Assn.* (1877), 67 Me. 363; *Loker v. Damon* (1835), 17 Pick. (Mass.) 284; *French v. Vining* (1869), 102 Mass. 132, 3 Am. Rep. 440; *Board, etc., v. Arnett* (1889), 116 Ind. 438; *Summers v. Tarney* (1890), 123 Ind. 560; *Standard Oil Co. v. Bowker* (1895), 141 Ind. 12; *Wabash R. Co. v. Miller* (1897), 18 Ind. App. 549, and cases there cited. See, also, *Sutherland, Damages* (3d ed.), §§88 *et seq.*, 1055; *Beach, Contrib. Neg.* (3d ed.), §69; *Thompson, Negligence* (2d ed.), §199 *et seq.*; 1 *Shearman & Redfield, Negligence* (5th ed.), §95; 2 *Shearman & Redfield, Negligence* (5th ed.), §741.

In cases involving the question as to duty of the plaintiff to cut down the damages, whether in contract or in tort, or whether for personal injury or for injury to

10. property or estate, the existence of fault in this respect on the part of the plaintiff, with the extent to which it contributed to his loss as a whole, constitutes matter of defense, and the burden of proof is upon the defendant. *City of Goshen v. England* (1889), 119 Ind. 368, 5 L. R. A. 253; *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74; *Citizens St. R. Co. v. Hobbs* (1896), 15 Ind. App. 610; *City of Columbia City v. Langohr* (1898), 20 Ind. App. 395; *Dunn v. Johnson* (1870), 33 Ind. 54, 5 Am. Rep. 177.

In view of the statements of the court relating to the conduct of the appellants with reference to the damage to merchandise in the year 1898 and succeeding years,

11. it would be impossible for us to determine that the court erred in failing to conclude that the appellants were entitled to damages for such losses. So, also, we cannot hold that there was error in overruling certain motions of the appellants for judgment in their favor for damages in such sum as would include damages for such losses in those years.

A motion of the appellants for a new trial was overruled. The court in its finding stated a strong case of continuing injury extending through many years. It was

12. found that ordinary rains of one or two hours' duration caused great accumulation of water, so that the streets, gutters and sidewalks were overflowed, and the water thus accumulating flowed with great force through the alley and on and over the premises of the appellants, spreading over the same and flowing into the buildings thereon, carrying debris and sediment of the street thereon, "and causing considerable and severe injury and damage to the plaintiffs' premises and merchandise kept and used in the business;" and that this injury was a recurring one; yet no damages were awarded for damage to the premises, and the only damages awarded were given for injury to certain cement in one of the years during which the wrong was continued. There appears to have been evidence of the amount of diminution in the rental value of the premises caused by the nuisance. The nuisance appears to have continued during all the period in which the appellants had carried on their business. The damages given in the sum of \$100 were awarded for injury suffered in the first year of their ownership of the property, so that it was impossible by comparison to show loss of profits occasioned by the wrong. The court should have found from the evidence before it some amount of damages referable to the great injury to the premises mentioned in the finding.

Another matter deserves attention. As a part of its judgment, rendered in March, 1905, the court ordered the city to remedy the defects in the street grading and

13. guttering within eight months thereafter, and to so much of the judgment as extended the time eight months for remedying such defects so as to avoid the overflow of the water, such "clemency" being granted over the objection of the appellants, they excepted. We cannot

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discover in the record any sufficient reason for granting such indulgence. The court should have caused the abatement of the nuisance more promptly.

Judgment reversed and cause remanded, with instructions to grant a new trial, and to grant the appellants leave, if asked, to amend their complaint.

JESSUP ET AL. v. FAIRBANKS, MORSE & COMPANY.

[No. 5,788. Filed October 25, 1906.]

1. **SALES.—Conditional.—Reservation of Title.—Option of Vendor to Treat Sale as Absolute.**—A sale of goods, the vendor reserving the title until the purchase price is fully paid, is a present sale on condition, giving the vendor the right, upon default by the vendee, either to retake such goods, thus disaffirming the sale, or to treat the sale as absolute by bringing an action for the purchase price. p. 675.
2. **SAME. — Contracts. — Discharge. — Reservation of Title.**—A present contract of sale in which the vendor reserves title to the goods sold is not discharged as to the vendee by an innocent destruction of such goods; and such vendee's promise to pay can be enforced. p. 676.
3. **SAME. — Contracts. — Consideration.—Reservation of Title.**—The consideration for a contract of sale, the vendor retaining the title to the goods sold until the purchase price is paid, is the delivery of the goods with the right to acquire the title thereto. p. 676.
4. **SAME. — Reservation of Title. — Election.**—The doctrine of election is applicable to the vendor in cases of sales of goods wherein he reserves title until such goods are paid for. p. 677.

From Parke Circuit Court; *Gould G. Rheuby*, Judge.

Action by Fairbanks, Morse & Company against Lincoln R. Jessup and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Doan & Orbison and *Hunt & Hancock*, for appellants.

Howard Maxwell and *Harvey, Pickens, Cox & Kahn*, for appellee.

COMSTOCK, P. J.—Appellee, a corporation, brought this action against appellants to recover the purchase price of a certain gasoline engine, which had been sold to appellants upon condition that the title and right of possession should remain in the vendor until payment had been made in full as specified in the written contract. Before all the payments provided for in the contract had been made, and before all payments had become due, the engine was wrecked by a fire which destroyed the building in which it was located.

The issues were formed by the complaint and an affirmative answer by the appellants, in which they set up the destruction of the engine by fire without fault on their part as causing a failure of consideration for the contract in suit. A copy of the contract was filed with the complaint and with the answer. Appellee filed a demurrer for want of facts to this answer, which demurrer was sustained, and, defendants refusing to plead further, judgment was rendered against them for the sum of \$499.87. From this judgment appellants appeal.

The sustaining of said demurrer is assigned as error for which a reversal is asked. We deem it necessary to set out only the following portions of exhibit A, a copy of the contract filed with the complaint and answer:

“Fairbanks, Morse & Company,
Manufacturers of Gas and Gasoline Engines,
Indianapolis, Indiana, October 3, 1903.

Jessup & Wheeler,
Oakdale, Indiana.

Fairbanks, Morse & Company hereby propose to furnish and deliver f. o. b. Beloit, Wisconsin, one 25 H. P. Fairbanks, Morse Gasoline engine, according to the following specifications:

[Then follow the specifications, the guarantee, and a list of supplies to be furnished with the engine.]

The foundation plan will be furnished by us, foundation to be prepared and furnished by you. A com-

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petent man to superintend the erection of the engine will be furnished by us. You will supply all necessary labor and do all teaming. We propose to furnish the above engine and material for the sum of \$800, payable at the office of Fairbanks, Morse & Company, Indianapolis, Indiana, of which amount \$200 is to be paid upon shipment, balance as follows: \$200 when erected and \$400 six months after shipment at seven per cent. per annum after due, also all expenses incurred in the collection thereof secured by contract.

It is agreed that the title and right of possession of said engine shall remain in Fairbanks, Morse & Company until payment has been made in full, as above provided, and in the event notes are taken representing the deferred payments the title shall not pass until said notes are fully paid and satisfied. Upon default of any payment when due, said Fairbanks, Morse & Company or their agent may enter the premises without process of law, take immediate possession of and remove said property, and any payments theretofore received they shall be entitled to retain to cover expenses of taking possession of the above described property and to cover usage, and wear and tear upon the same.

This proposal is binding when signed by the purchaser and approved by the manager of Fairbanks, Morse & Company at Indianapolis, it being expressly understood and agreed that this is the only contract existing between the parties here mentioned and that there are no verbal agreements to the contrary.

Fairbanks, Morse & Company,

Proposal Accepted by:

Jessup & Wheeler."

The foregoing is a sale on condition. It is not a contract to make a future sale. It required nothing to be done by the vendor to pass title. It gives the vendor the

1. right, upon vendee's default, to retake the property, which is a disaffirmance of the sale, or he may treat the sale as absolute and bring an action for the price. *Turk v. Carnahan* (1900), 25 Ind. App. 125, 81 Am. St. 85;

Green v. Sinker, Davis & Co. (1893), 135 Ind. 434; *Smith v. Barber* (1899), 153 Ind. 322.

The contract being a present contract of sale, its stipulation that the title should remain in the vendor until the full payment of the purchase price, did not relieve the

2. vendees from the contract to pay, because the property was injured or destroyed. *American Soda Fountain Co. v. Vaughn* (1903), 69 N. J. L. 582, 55 Atl. 54; *Osborn v. South Shore Lumber Co.* (1895), 91 Wis. 526, 65 N. W. 184; *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; *Burnley v. Tufts* (1888), 66 Miss. 48, 5 South. 627, 14 Am. St. 540; *Tufts v. Griffin* (1890), 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. 863; *Tufts v. Wynne* (1891), 45 Mo. App. 42; *Planters Bank v. Vandyck* (1871), 4 Heisk. (Tenn.) 617; *Humeston v. Cherry* (1880), 23 Hun 141; *LaValley v. Ravenna* (1905), 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97. In numerous decisions outside of Indiana, in cases of conditional sales, in which the property was destroyed before the payments were made in full, it has been held that the vendor may sue upon the promise of the vendee to make payment. In the foregoing list we have given some of them.

American Soda Fountain Co. v. Vaughn, *supra*, was a case of destruction of property in the possession of the vendee under such contract, and the court said: "The question to be determined is: What was the considera-

3. tion of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus, with the right to acquire title, was the consideration, the plaintiff shall prevail. We think the consideration for the note was the delivery of the apparatus with the right to acquire title.

* * * The title was retained by the plaintiff merely as security for the unpaid purchase-money. Nothing remained to be done by the plaintiff to perfect the title of the

defendant; that title would have become perfect immediately upon payment. * * * The exact question presented in the present case has been considered in other states, and although there is conflict in the authorities, the weight of authority is in favor of the plaintiff. *Burnley v. Tufts* [1888], 66 Miss. 48; *Tufts v. Griffin* [1890], 107 N. C. 47; *Osborn v. South Shore Lumber Co.* [1895], 91 Wis. 526."

In *LaValley v. Ravenna*, *supra*, upon the sale of a horse, a written lien was executed reciting that the seller was to retain title until the balance of the purchase price was paid. The horse died before the balance was due, and the court held that the seller was entitled to recover the balance.

In our own State the cases hold that under such contracts as the one before us the vendor has the right to elect whether to retake the property or sue for the purchase price on the promise to pay. *Smith v. Barber*, *supra*; *Kilmer v. Moneyweight Scale Co.* (1905), 36 Ind. App. 568; *Gaar, Scott & Co. v. Fleshman* (1906), *ante*, 490. *Smith v. Barber*, *supra*, distinctly holds that there is nothing to be done by the vendor and nothing in the way of acceptance is necessary on the part of the vendee.

Cases cited by appellant are distinguishable from those cited in this opinion, except, perhaps, *Cobb v. Tufts* (1884), 2 Tex. App. Civ. Cas. 141. We regard the question as settled in this State. "In such a contract of sale—the possession to be in the buyer, the title to remain in the seller until full payment—there is a sufficient consideration for the absolute promise to pay the agreed price." *Kilmer v. Moneyweight Scale Co.*, *supra*.

Judgment affirmed.

POLLEY v. POGUE ET AL.

[No. 5,883. Filed October 25, 1906.]

1. **APPEAL AND ERROR.**—*Weighing Evidence.*—*Bills and Notes.*—The Appellate Court will not weigh conflicting evidence to overthrow the trial court's finding that the note in suit was not a renewal of a former note. p. 679.
2. **MORTGAGES.**—*Validity.*—*Widow Remarrying.*—*Descent and Distribution.*—A mortgage executed by a married woman, who inherited the lands mortgaged from a former husband by whom she had children living, is void under §2641 Burns 1901, §2484 R. S. 1881. p. 679.
3. **JUDGMENT.**—*Without Relief.*—*Bills and Notes.*—A judgment rendered upon a note containing a provision that it shall be collectible without relief from valuation or appraisement laws should, under §585 Burns 1901, §576 R. S. 1881, provide for the collection thereof without any such relief. p. 679.
4. **SAME.**—*Without Relief.*—*Evidence.*—An unimpeached stipulation in a note that such note should be collectible without relief entitles the plaintiff to a judgment so collectible. p. 680.
5. **NEW TRIAL.**—*Contrary to Law.*—*Insufficient Evidence.*—*Failure to Find Proven Facts.*—A failure to find material proven facts renders the decision pronounced upon the special findings contrary to law; and a new trial will be granted therefor as well as upon the ground of the insufficiency of the evidence. p. 680.

From Jay Circuit Court; *John W. Macy*, Special Judge.

Suit by Jennie C. Polley against Josephine A. Pogue and others. From a decree for plaintiff, for less than her claim, she appeals. *Reversed.*

Smith & Moran, for appellant.

ROBINSON, C. J.—Suit by appellant upon a promissory note and to foreclose a mortgage.

John R. Bolen died intestate, the owner in fee of certain lands, leaving as his only heirs at law appellee Josephine A. Pogue, his widow, and the other appellees (except John Pogue), his children. During her widowhood, Josephine borrowed \$300 from appellant and executed her note and mortgage to secure its payment. Afterward, and before

her marriage with Pogue, the land having been set off to Josephine as her interest in the lands of Bolen, Josephine sold a part of the land to Bickel, who assumed and agreed to pay \$200 of such mortgage, which he paid with interest. Josephine intermarried with John Pogue, and is now his wife. Afterward she borrowed from appellant \$175, and agreed to pay commission and expense of \$10 for the same, and executed the note in suit in consideration of such loan and commission, and to secure the same she and her husband, John Pogue, executed the mortgage mentioned in the complaint. This mortgage was not a renewal of any part of the first mortgage, but was to secure a loan made to Josephine A. Pogue. The loan for \$175 has never been paid, and is due in the sum of \$405.70.

Upon the above finding of facts the court stated as a conclusion of law that appellant "is entitled to recover of the defendant Josephine A. Pogue the sum of \$405.70, together with her costs of suit, so far as it relates to the suit on the note;" that the other defendants should recover costs, and that appellee should recover all costs made by her on her defense against the mortgages sued on.

We cannot disturb the court's finding, upon the evidence, that the mortgage given to secure the note in suit

1. was not a renewal of any part of the first mortgage given by Josephine A. Pogue while she was the widow of John Bolen. There is evidence authorizing the finding that this note was a loan made to Josephine
2. A. Pogue. The second mortgage was void. §2641 Burns 1901, §2484 R. S. 1881.

The judgment follows the conclusions of law, and the conclusions of law upon the facts found are right. But

- under the motion for a new trial it is argued that
3. the finding should contain the fact that the amount due the appellant was without relief. The note stipulated that it should be collectible without relief from valuation or appraisement laws. The statute provides that

when a judgment is to be executed without relief from appraisal laws it shall be so ordered in the judgment. §585 Burns 1901, §576 R. S. 1881. The stipulation in

the contract, unimpeached in any way, entitled appellant to a judgment without relief; but the judgment rendered does not so stipulate, and could not so stipulate, based upon the conclusions from the facts as found. *Duckwall v. Kisner* (1893), 136 Ind. 99.

"Where pertinent and material facts are proved," said the court in *Gray v. Taylor* (1891), 2 Ind. App. 155, "but the court does not find upon them, and thereby im-

pliedly finds that they are not proved, the finding in such respect is contrary to law, as well as contrary to the evidence, and good cause arises therefrom for a new trial." See, also, *Spraker v. Armstrong* (1881), 79 Ind. 577; *Robinson v. Snyder* (1881), 74 Ind. 110.

The motion for a new trial should have been sustained. Judgment reversed.

HOME INSURANCE COMPANY v. GAGEN.

[No. 5,500. Filed February 14, 1906. Rehearing denied June 8, 1906. Transfer denied October 25, 1906.]

1. PLEADING.—*Complaint.*—*Contracts.*—*Performance.*—*General Allegations.*—*Special.*—A complaint counting upon a written contract and failing to allege generally the performance by the plaintiff, as provided by §373 Burns 1901, §370 R. S. 1881, must allege with certainty to a common intent the facts showing performance. p. 684.
2. SAME.—*Complaint.*—*Insurance.*—*Conditions.*—*Performance by Plaintiff.*—"Duly."—A complaint upon an insurance policy alleging that plaintiff "has duly performed all the conditions on his part to be performed," sufficiently alleges performance by plaintiff, the word "duly" neither adding to, nor detracting from, such allegation. p. 684.
3. SAME.—*Complaint.*—*Insurance.*—*Conditions.*—*Performance.*—*Allegations.*—A complaint upon an insurance policy alleging that plaintiff "has performed all the conditions on his part to

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be performed," sufficiently advises defendant and the court that the conditions mentioned refer to the conditions of the policy sued upon. p. 684.

4. **PLEADING.**—*Complaint.*—*Insurance.*—*Conditions.*—*Performance.*—*General Allegations.*—*Particular.*—Where a general allegation of performance by plaintiff is made in a complaint on an insurance policy, a particular averment which does not contradict such allegation does not injure such complaint. p. 684.
5. **SAME.**—*Complaint.*—*Paragraphs.*—*Insurance.*—*Conditions.*—*General Allegation of Performance.*—*Waiver.*—The waiver, by defendant, of a condition in an insurance policy is inconsistent with a general performance by plaintiff of all the conditions of such policy, it being necessary to make allegations of waiver and performance in different paragraphs of the complaint. p. 685.
6. **SAME.**—*Complaint.*—*Action.*—*Sufficiency of Facts.*—*Surplusage.*—A complaint stating facts sufficient to constitute a single consistent cause of action is good, though it contain surplus facts relating to a different cause of action. p. 685.
7. **SAME.**—*Complaint.*—*Insurance.*—A complaint showing that defendant executed a policy of insurance on plaintiff's barn, covering loss thereof by lightning, in consideration of the payment of a certain premium; that such barn was destroyed by lightning; that plaintiff performed all conditions on his part, and that plaintiff sustained by reason thereof a certain loss, is sufficient on demurrer. p. 685.
8. **INSURANCE.**—*Policies.*—*Construction.*—Provisions in an insurance policy written by the insurer are construed most strictly in favor of the assured. p. 686.
9. **SAME.**—*Policies.*—*Vacancy.*—*Void.*—A clause in a lightning policy providing that if the "premises" become vacant, unoccupied or uninhabited, the policy shall be void refers to the farm upon which the insured barn is situated, and not to the barn. p. 686.
10. **SAME.**—*Policies.*—*Vacancy.*—*Defense.*—A breach of a lightning policy caused by the vacancy of the property insured is a defense which can be asserted only by a special answer. p. 686.
11. **TRIAL.**—*Instructions.*—*Refusal.*—*When Harmless Error.*—The refusal to give an instruction not wholly good, or one substantially covered in another given, or one that is inconsistent or adapted to confuse, or one containing supposed facts which the jury finds to have had no existence, is not error. p. 690.
12. **SAME.**—*Insurance.*—*Instructions.*—*Confusing.*—Where the only loss recoverable under a policy was for damages by light-

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ning, it is not error to refuse an instruction framed as if the policy covered loss by wind, cyclone or tornado as well as by lightning, such instruction being calculated to confuse the jury. p. 692.

13. TRIAL.—*Insurance. — Instructions.—Answers to Interrogatories.*—It is not error in a lightning insurance case to refuse to instruct that the jury, though they are confined to the evidence in the case, are not precluded from using their own knowledge of lightning, wind and cyclones, and that, applying their knowledge, they may reject certain evidence which may appear to them incredible, and find that the fall of the barn was caused by a wind and cyclone and not by lightning, where the substance thereof was covered by other instructions and the answers to the interrogatories showed that the insured barn fell because of a stroke of lightning before the storm arrived, such instruction also being an invasion of the province of the jury. p. 693.
14. SAME.—*Instructions Requested.—Covered by Those Given.*—It is not error to refuse a requested instruction which is substantially covered by one given. p. 694.
15. SAME.—*Instructions.—Answers to Interrogatories.—Harmless Error.*—Where the answers to the interrogatories show the supposed facts embodied in an instruction to be untrue, the refusal to give such instruction is harmless error. p. 694.
16. APPEAL AND ERROR.—*Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence. p. 694.
17. SAME.—*Death of Party.—Judgment.*—Where the appellee dies during the pendency of an appeal, judgment will be entered as of the date of submission. p. 695.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Action by John P. Gagen against the Home Insurance Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Stuart, Hammond & Simms, Guenther & Clark and *Joseph F. Sleeper*, for appellant.

Kumler & Gaylord and *James V. Kent*, for appellee.

BLACK, P. J.—The appellant's demurrer to the appellee's complaint for want of sufficient facts was overruled. The action was based upon a policy of insurance on the appellee's east bank barn on certain land in Tippecanoe county, against loss or damage by fire and lightning.

The objection urged against the complaint relates to the averments respecting performance on the part of the appellee. In the policy, made part of the complaint, the appellant agreed to indemnify and make good unto the assured, his executors, etc., after compliance with the conditions of the policy by assured, and within sixty days after receipt by the Western Farm Department of the appellant of Chicago, Illinois, of the proofs required in the policy, etc. It was provided that, "in case of loss, the assured shall, within fifteen days, give this company written notice thereof, at the office of" the department above mentioned, "and within sixty days thereafter shall render to such office, under oath, a particular and detailed statement and proofs of the actual cash value at the time of the loss of any property or articles upon which loss or damage is claimed."

In the complaint it was alleged that the appellee "has duly performed all the conditions on his part to be performed, and that on July 5, 1902, said building known as the 'east bank barn' was totally destroyed by fire and lightning; that the plaintiff shortly thereafter, to wit, on July 12, 1902, gave the defendant written notice of his said loss, at the office of the Western Farm Department of said company at Chicago, Illinois, and on September 2, 1902, gave the defendant due proof of his loss, as called for in said policy of insurance; and that afterward, on September 5, 1902, the defendant returned said proof of loss, and denied all liability under said contract of insurance, and refused to pay said loss."

It is suggested on behalf of the appellant that this general averment of performance of conditions is not sufficient; that "the averment should be that said plaintiff has duly performed all the conditions in said policy on his part, or words of equivalent directness," thereby expressly limiting the reference to conditions to those contained in the policy. It is further objected that the averment relating to notice

and to proof of loss "is the statement merely of a conclusion, and is not sufficient."

Our civil code provides that the complaint shall contain "a statement of the facts constituting the cause of action, in plain and concise language, without repetition,

1. and in such manner as to enable a person of common understanding to know what is intended." §341

Burns 1901, §338 R. S. 1881. A subsequent section of the code provides: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegation be denied, the facts showing a performance must be proved on the trial." §373 Burns 1901, §370 R. S. 1881. If the pleader neglects the privilege thus granted of pleading performance generally, he must state with certainty to a common intent the facts showing performance.

The general statement of performance in the complaint before us was not affected injuriously or beneficially by the word "duly" before the word "performed," what-

2. ever may be said of the averment that he "gave due proof of his loss, as called for in said policy of insurance." The learned counsel for the appellant indicate their agreement with this proposition in the form which they suggest as proper, above quoted. It is suffi-

3. ciently manifest that the pleader had reference to the conditions in the contract in suit. There could be no misapprehension or uncertainty as to the purpose of the pleader in this regard on the part of the defendant or its counsel or the court; and to uphold the suggestion of the appellant would be too great strictness.

Having sufficiently pleaded performance by the general averment, it was not necessary to go on and plead facts showing a performance. If in thus needlessly

4. seeking to show performance by the statement of the facts constituting it there was failure to state

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those facts with sufficient certainty, yet there was nothing shown in the pleading which contradicted the general averment or which was inconsistent with it. If it be the intention of the pleader in such case to show waiver of

5. performance of conditions precedent, this should be done in a separate paragraph, for such reliance upon an excuse for nonperformance is not consistent with an assertion of performance. It is contended by the appellant that the complaint does not show sufficiently a waiver of performance. A paragraph of complaint should state a single consistent cause of action, and if we find

6. in the complaint sufficient facts for such purpose we may uphold the pleading, though there be in it unnecessary statements pertaining to another cause of action. We think the complaint was not insufficient

7. on demurrer. See *Hanover Fire Ins. Co. v. Johnson* (1901), 26 Ind. App. 122, and cases cited.

The answer was a general denial, and the cause was tried by jury. The appellant's motion for a new trial was overruled.

In the policy it was stipulated and agreed, with and following many other things, that "if the premises described shall be occupied for other than farm purposes, or if they are now vacant, unoccupied or uninhabited, or shall become vacant, unoccupied or uninhabited, without consent hereon, then and in each and every one of the above cases, this policy shall be null and void."

The evidence showed that the barn insured had never had anything in it. The property insured was known, it is said in the policy, as "the east bank barn," and was referred to in the policy as being owned by the assured and situated on and confined to 310 acres in section six, township twenty-two, range three, Tippecanoe county, State of Indiana. The contract was made upon a form containing many blanks, adapted to many kinds of property, and the words "premises herein described" occurred frequently in the

policy, some of which, omitting the blanks for amounts preceding them, were as follows: "On farm implements, utensils, and farm machinery while in said barns and sheds or on the premises herein described, excepting threshing machines;" "on grain in granaries, barns or cribs, or in stacks on the premises herein described," etc.; "on hay in stacks, on cultivated grounds only, on the premises herein described," etc.; "on," etc., certain kinds of animals, "against fire and lightning while in said barns and sheds or at large upon the premises herein described, and against lightning, but not against fire, while off said premises." It was provided that the policy should not be construed to cover property "which is located elsewhere than on the premises or in the buildings as particularly mentioned and described herein." Permission was given "to erect ordinary farm outbuildings in which no fire shall be used, and to erect additions to the within-described buildings."

The farm on which the barn was situated was in the possession of the appellee's tenant, who lived in the dwelling-house thereon. The provision that the policy should

8. be void if the premises were vacant, unoccupied or uninhabited, inserted for the protection of the insurer, is, like all other provisions of the contract, the form of which was provided by the insurer, to be construed most strongly against the insurer and most favorably as to the assured, and is to be regarded as having reference
9. to the continued occupancy of the farm by human beings; the word "premises" here, as throughout the contract, meaning the farm. But this condition, to whatever property it related, could not avail the appellant upon the trial, as its nonobservance would constitute matter of defense to be specially pleaded, and evidence showing such nonobservance, not within the issues in this case, would not affect the appellee's right of recovery.

The policy contained a provision that it should not be construed "to insure against any loss or damage which may occur from winds, cyclones or tornadoes." The court, upon the request of the appellant, instructed the jury, that under the evidence there could be no recovery on account of fire, as there was no evidence tending to show that the barn was destroyed, wholly or in part, or in any way injured, by fire; and the jury specially found, in answer to interrogatories proposed by the appellant, that the barn fell down on a day specified, being the date of its destruction designated in the complaint, and that no part of the barn, at, before, or after the falling thereof on that day, was destroyed by fire. The question about which there is most contention is whether the barn was destroyed by lightning or by a strong wind or tornado.

The jury also found in the affirmative in answer to the question: "Was the barn, on said day, at or before said falling, struck by lightning?" The jury were asked to state the amount of damage done to the barn on account of being struck by lightning, "exclusive of the damage, if any, caused to said barn by wind, cyclone, or tornado," and answered \$1,000, which was the amount of the insurance. They further found specially that the barn was not caused to fall down at said time by wind, cyclone, or tornado; that there was not at the time of said accident a strong wind, cyclone or tornado blowing from the south or southwest. "Did said wind, cyclone, or tornado strike said barn on the south side thereof? A. No. Did said wind, cyclone, or tornado, when it struck said barn, move the same from its foundation at the southwest and northwest corners for a distance of from two to four feet? A. No. In so moving said barn, did the north side thereof fall substantially in the direction in which said wind, cyclone, or tornado was moving? A. No. In so falling did the south side of said barn fall over towards the north side thereof? A. Yes." It was specially found that the barn was covered with

shingles, and that there were shingles found from twenty to fifty rods away, but that there was no evidence where they came from. "If the jury find that said barn was moved from its foundation and caused to fall by a stroke of lightning, they will state particularly what part of said barn was so struck by lightning, and how said lightning moved said barn from its foundation and caused the same to fall over. A. We do not know where it struck, but find from the evidence that it ran down a rafter and down a post and crushed the north wall, which caused the barn to collapse." It was found that the accident occurred at about 1:30 o'clock p. m. July 5, and the jury answered in the affirmative to the interrogatory: "Were a number of trees in the course of said wind, cyclone, or tornado, northeast and southwest of the barn in question, blown over by said wind, cyclone, or tornado?" The jury also found that the barn was ninety-eight feet long from east to west, and forty feet wide from north to south; that on the north side, and on the east and west ends, it stood on a brick wall eight or nine feet high; that at the east and west ends were openings in the walls, twelve feet, with sliding doors; that at each end on its south side the barn was supported by a wall of about the same height for a distance of about twelve feet from each corner, and that between said brick corners, on the south side of the barn, it was supported by posts or beams twelve or fourteen feet apart.

Among the instructions requested by the appellant were the following, which the court refused: "(11) If the jury find from the evidence that said barn was first struck by lightning, and thereby weakened, but that said barn would not have fallen had it not been for the wind, cyclone, or tornado, if any, following the stroke of lightning, then in such case the verdict of the jury will be confined exclusively to the damages, if any, occasioned by lightning, and in such case there can be no recovery for the plaintiff on account of the fall of said barn by wind, cyclone, or tornado, and this

is so even though the barn would not have fallen by said wind, cyclone or tornado, if it had not been first weakened by being struck by lightning. (12) The jury, in deciding this case, while they are confined to the evidence in the case, are not excluded from their own knowledge, derived from experience, of the effect of lightning, winds, cyclones, or tornadoes. If the jury, from their own experience and knowledge, deem it absolutely incredible that a barn, such as the barn in question, could be removed from its foundation, if it was so removed, and caused to fall, by a stroke of lightning, and if the jury also find that at or about the time the barn was struck by lightning, if it was struck, there was a heavy wind, cyclone, or tornado, sufficient to cause the fall of the barn, then the jury, applying their own knowledge derived from experience, may find that the fall of said barn was not occasioned by lightning, but by wind, cyclone, or tornado. (13) The jury are the exclusive judges of the credibility of witnesses and of the weight that should be attached to their evidence. If any witness or witnesses in this case testify to facts, if any, which in themselves are unreasonable and incredible, the jury may disregard the evidence of such witness or witnesses, even though the same is not directly contradicted by the evidence of any other witness. (14) The jury, in deciding the case, are to take into consideration all the circumstances and surroundings of the accident in question which may have reasonable or pertinent bearing thereon. It is proper for them to determine whether at the time in question there was a severe wind, cyclone, or tornado, that did damage to any other building or buildings in the vicinity of the barn in question, or to any tree or trees, and if they find there was a severe wind, cyclone, or tornado at the time in question, it will be proper for the jury to ascertain, if they can from the evidence, the course and direction thereof, and whether the barn in question was in the track thereof. The jury may consider the nature of the fall of the barn in question,

whether it was in fact moved from its foundation, whether the movement of the barn was such as to indicate that in its movement it followed in a general way the direction, if any, of such wind, cyclone or tornado, if any, and may also consider, under all the circumstances, whether it was more probable that the barn should be moved, if it was moved, and caused to fall, if it did fall, from wind, cyclone, or tornado, than from lightning; and upon consideration of all these questions the jury as honest, conscientious men, striving to do exact justice between the parties, should come to a conclusion which, under the evidence, will do justice to both parties."

The appellant complains of the action of the court as to each of these instructions.

If an instruction requested is not good as a whole, if any portion of it would be erroneous, or if such an instruction is substantially embraced in instructions given, or if

11. it is not consistent within itself, or if it is adapted to confuse the jury, or if the supposed facts upon which it proceeds are found by the jury to have had no existence, there can be no available error in rejecting it.

It is proper in considering these rejected instructions to examine the instructions given. The court gave eleven of the instructions asked by the appellant. It thus instructed that the policy insures simply against loss or damage by fire and lightning and contains a provision that it does not insure against any loss or damage which may occur from winds, cyclones or tornadoes; that the only question is whether there was any injury to the barn, in whole or in part, by lightning, and if there was any injury to it from wind, cyclone, or tornado, there cannot be any recovery in this action for the injury thereby sustained; that it will be for the jury to determine, in the first place, whether the barn at the time in question was struck by lightning; that if the plaintiff has not established this fact by the preponderance of the evidence, the jury should find for the

defendant; that if the jury find that the plaintiff has established by the preponderance of the evidence that the barn in question, at the time in question, was struck by lightning, then the jury will ascertain the amount of damages, if any, that occurred to the barn on account of lightning, exclusive of the damage, if any, which it received on account of wind, cyclone, or tornado, and in such case the verdict will be confined exclusively to the amount of damage, if any, occasioned by lightning, and any damage in such case, if any, occasioned by wind, cyclone, or tornado, will not be embraced in the verdict, because, as to such damages, if any, on account of wind, cyclone, or tornado, the plaintiff cannot recover; that if the jury find from the evidence that the barn, at the time of its alleged falling, was struck by lightning, and also that it was struck at the same time by a severe wind, cyclone, or tornado, it will be for the jury to determine from the evidence whether the barn was caused to fall by the lightning or by the wind, cyclone, or tornado, and if they find that the falling thereof and the damages complained of were caused solely by wind, cyclone, or tornado, the plaintiff cannot recover, and the jury should find for the defendant; that if the jury find from the evidence that the barn was first struck by lightning, and shortly thereafter struck by wind, cyclone, or tornado, and that it was caused to fall by said wind, cyclone, or tornado, and that all the damage complained of resulted from such wind, cyclone, or tornado, then the jury should find for the defendant; that if they should find from the evidence that the barn was first struck by lightning, the jury should ascertain the amount of damage, if any, occasioned by such lightning, and if the barn, after being so struck by lightning, was caused to move and fall by wind, cyclone, or tornado, the plaintiff cannot recover for any damages occasioned by such wind, cyclone, or tornado, but his recovery will be confined exclusively to the damage, if any, done the barn and occasioned by lightning.

"10. If the jury should find from the evidence that said barn was first struck by lightning, but that it would not have fallen as it did had it not been for wind, cyclone, or tornado striking it soon after it was so struck by lightning, then the plaintiff will not be entitled to recover for damages, if any, occasioned by such wind, cyclone, or tornado, but their verdict will be confined exclusively to the damages, if any, occasioned by the lightning."

The court in its instructions given of its own motion, told the jury, among other things, that they were the exclusive judges of the credibility of the witnesses, the weight of the evidence, and of the facts established by the evidence; that the burden was upon the appellee to prove, by a fair preponderance of all the evidence in the cause, the material allegations of the complaint; that in determining the credibility of the witnesses, the jury had the right to take into consideration, among other matters stated, their knowledge and means of knowledge of the facts about which they testified, their general intelligence, and the reasonableness or unreasonableness of their testimony.

In the eleventh instruction asked by the appellant, above set out, it was sought to present to the jury a hypothetical condition, and to charge the jury that if such con-

12. dition existed the verdict should be confined exclusively to the damages, if any, occasioned by the lightning, and there could be no recovery on account of the fall of the barn by wind, cyclone, or tornado. It was not stated that the jury might consider such supposed circumstances, if proved, in determining whether the barn fell by wind, cyclone, or tornado, or by lightning. We need not determine whether, if it were so stated in the instruction, it would be a correct instruction, or whether the instruction as framed set forth a correct theory as to the proximate cause in a case of a policy covering loss by wind, cyclone, or tornado, as well as loss by lightning. The court plainly informed the jury that there could not be any recovery for

the fall of the barn by wind, cyclone, or tornado, but that the damages, if any, must be exclusively for loss or damage by lightning, under any and all supposable conditions, because the evidence showed no loss by fire, and the policy did not cover loss by wind, cyclone, or tornado. The instruction seems to have been framed for the purpose of preventing recovery of damages for loss by wind, cyclone, or tornado, and of confining the damages to loss by lightning, under supposed circumstances, as if the case were one in which the policy covered loss by wind, cyclone, or tornado, as well as loss by lightning. It was not improper to refuse so to contribute to confusion in the minds of the jurors.

Concerning the twelfth instruction, it may be said that in instructions given the jury were told of their right to consider the reasonableness or the unreasonableness

13. of the statements of the witnesses, and that by this rejected instruction it was proposed not merely to authorize the jury to exercise their own actual knowledge derived from experience of the effects of lightning, winds, cyclones, or tornadoes, but to authorize them, from their own actual experience and knowledge, without regard to the scope or variety of their experience and knowledge, to deem or infer it to be absolutely incredible that such a barn could be removed from its foundation and caused to fall by a stroke of lightning. The learned counsel differ widely, and, we doubt not, sincerely, in their opinions as to the manifestations and effects of lightning, and counsel for the appellant advise us that we may learn something advantageous on this subject from books which especially treat of it, yet the proposed instruction does not refer the jury to their experiences and knowledge of cases like the one to be decided. The instruction proceeds to inform the jury that if they thus, from their own experience and knowledge, deem such a state of facts to be incredible, and if they also find that "on or about the time the barn was struck by lightning" there was a heavy wind, cyclone, or tornado, sufficient to

cause the fall of the barn, then they, applying their own knowledge derived from experience, however limited, might find its fall was not occasioned by lightning, but was caused by wind, cyclone, or tornado.

Now, if it was true, as some of the witnesses testified and as the jury viewed the matter, that the barn was not standing when the wind came, but in fact fell when struck by lightning preceding the wind, the jury could not, by applying their own knowledge derived from their experience, infer that the fall was caused by the wind. The instruction does not expressly limit the inference, by it authorized, to a case where the barn was still standing when the wind arrived. Besides, this instruction seems to encroach upon, if not to invade, the province of the jury by suggesting the conclusions of fact to be drawn from the evidence; and considered in connection with the instructions given, and the special findings of the jury, we cannot regard the refusal to give this instruction as erroneous.

14. The thirteenth instruction was sufficiently embraced in the instructions given.

As to the fourteenth instruction, if it was not erroneous thus to authorize the jury to base their verdict upon probability, yet if it was true as found by the jury that

15. the barn was demolished by lightning before the wind came, the refusal of the instruction could not be harmful. The instructions given seem to have placed the case before the jury without unfairness to the appellant.

It is earnestly contended on behalf of the appellant that the verdict was not sufficiently supported by the evidence, and in this connection, as throughout the case, we

16. are earnestly urged to adopt the theory that the damage to the barn was such as could not have been caused by lightning, but must have been caused by wind. Undoubtedly, some of the facts of the condition of the

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ruins seem to be such as might have been the result of a strong wind, and there were conditions which could scarcely have been so produced, but might have been caused, by lightning. It would be as difficult for us to attribute the damage to the wind as to refer it to lightning.

We have already made this opinion somewhat lengthy, and to attempt to set out the evidence with fairness would require more space than we deem it proper to take. The question thus in dispute is one of fact, and we cannot interfere with the decision of it in the trial court with requisite confidence in our conclusion to the contrary.

The death of the appellee since the submission of the cause in this court having been suggested,
17. the judgment is affirmed as of the May term, 1904.

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[No. 5,840. Filed October 26, 1906.]

APPEAL AND ERROR.—Final Judgment.—What is.—A judgment in form: "It is therefore considered and adjudged by the court that the plaintiff pay the costs herein paid, laid out, and expended," is not final; and an appeal will not lie therefrom.

From Adams Circuit Court; *R. K. Erwin*, Judge.

Suit by Calvin Miller against George E. McKean and others. From a decree for defendants, plaintiff appeals.
Appeal dismissed.

A. P. Beatty and Merryman & Sutton, for appellant.

Shaffer Peterson and Smith & Moran, for appellees.

BLACK, J.—The appellant sued to recover of the appellee George E. McKean contribution because of the payment by the appellant of certain alleged debts of these parties, and to set aside a conveyance of real estate made by said McKean to defraud his creditors. Upon the trial of issues

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formed there was a general finding "for the defendants." The only judgment shown by the record was entered as follows: "It is therefore considered and adjudged by the court that the plaintiff pay the costs herein paid, laid out, and expended." This is not a final judgment from which an appeal will lie.

Appeal dismissed.

STASER v. GAAR, SCOTT & COMPANY ET AL.

[No. 5,817. Filed October 26, 1906.]

1. JUDICIAL SALES.—*What Are*.—A judicial sale is one authorized by a competent tribunal and made by an officer authorized by law to make such sale. p. 698.
2. SAME.—*Partition*.—*Confirmation by Court*.—A sale made under the order of a court by an officer appointed thereby for the purpose, and which sale becomes effective only upon confirmation by such court is a judicial sale, partition sales being included. p. 698.
3. SAME.—*Partition*.—*Conveyances*.—*Wife Not Joining*.—*Husband's Creditors*.—*Wife's Rights*.—*Statutes*.—Where the wife of one of the tenants in common of certain lands did not join in any conveyance of such lands, she ought to be held to be a proper party in a suit for the partition of such lands and should be entitled under §2669 Burns 1901, §2508 R. S. 1881, to receive the one-third part of the proceeds of the husband's share in preference to her husband's creditors. *Haggerty v. Wagner*, 148 Ind. 625, *contra*. p. 698.
4. APPEAL AND ERROR.—*Erroneous Ruling Precedent*.—*Transfer*.—Where a ruling precedent of the Supreme Court is deemed erroneous, the Appellate Court will transfer the cause to the Supreme Court with a recommendation that such precedent be overruled. p. 699.

From Vanderburgh Circuit Court; *Louis O. Rasch*, Judge.

Suit by Lewis C. Staser against Gaar, Scott & Company and others. From a decree against defendant Anna

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Staser, she appeals. *Transferred to Supreme Court.* (For decision on transfer, see 168 Ind. —.)

G. V. Menzies and Spencer & Brill, for appellant.

Ireland & Reister, for appellees.

ROBY, J.—Section 2652 Burns 1901, §2491 R. S. 1881, provides that “a surviving wife is entitled * * * to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law.” By §2669 Burns 1901, §2508 R. S. 1881, it is provided that “in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof. * * * When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition.”

In the case at bar, Lewis C. Staser brought a suit for partition, setting up his ownership as tenant in common with other parties named of certain real estate described. Said real estate was found to be indivisible. A commissioner to sell the same was appointed, who duly reported such sale and now has the proceeds thereof in his hands for distribution.

Subsequently to the sale, the wife of said Staser, was by order of court made a party defendant, and sets up her right as such wife, under §2669, *supra*. Gaar, Scott & Co. were also made defendants and set up their right to the

interest of said husband by virtue of a lien upon said land, under a judgment against said husband.

The question for decision is whether the judgment creditor of the husband can, as against the wife, hold the entire fund realized from the sale in the partition proceeding of the husband's real estate, in the conveyance of which the wife has not joined, and to which proceeding she was not a party.

A judicial sale is "a sale, by authority of some competent tribunal, by an officer authorized by law for the purpose. The term includes sales by sheriffs, mar-

1. shals, masters, commissioners, or by trustees, executors, or administrators, where the latter sell under the decree of a court." Bouvier's Law Dict., title: Judicial Sales.

A sale made under the process of a court by an officer appointed and commissioned to sell, which becomes absolute only upon confirmation by the court, is in every

2. essential respect a judicial sale. 17 Am. and Eng. Ency. Law (2d ed.), 953; *Lawson v. DeBolt* (1881), 78 Ind. 563. It includes a sale in partition. 17 Am. and Eng. Ency. Law (2d ed.), 954, and authorities cited under note 4.

The facts exhibited by the record herein entitle the wife to the benefit of §2669, *supra*. But in the case of *Haggerty v. Wagner* (1897), 148 Ind. 625, 39 L. R. A. 384,

3. it was held by a divided court that it is not "necessary in a partition suit between cotenants, where one of the cotenants has a wife living at the time the partition proceedings are had, to make such wife a party thereto in order to make such proceedings binding on her in case she outlives her husband and becomes his surviving widow." In that case the wife, after the death of her husband, sought to recover from a grantee of the purchaser her interest in the real estate. In this case the question

Hancock v. Diamond Plate Glass Co.—38 Ind. App. 699.

arises between a judgment creditor of the husband and the wife.

The propositions laid down in the main opinion in *Haggerty v. Wagner, supra*, are inconsistent with the conclusion to which we are irresistibly drawn in the case

4. at bar. Such conclusion accords with the propositions asserted in the forcible dissenting opinion filed therein.

This case is therefore transferred to the Supreme Court, with the recommendation that *Haggerty v. Wagner, supra*, be overruled.

HANCOCK v. DIAMOND PLATE GLASS COMPANY
ET AL.

[No. 4,682. Filed March 29, 1906. Rehearing denied June 5, 1906.]

From Howard Superior Court; *B. F. Harness*, Judge.

Action by William Hancock against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

B. C. Moon, for appellant.

Bell & Purdum and Blackledge, Shirley & Wolf, for appellees.

ROBINSON, J.—Action by appellant upon a gas lease to recover acreage rental. Upon a trial a judgment was rendered upon a verdict in favor of appellee.

The error assigned questions the action of the court in overruling appellant's motion for a new trial.

The case is here on the second appeal. *Diamond Plate Glass Co. v. Hancock* (1900), 24 Ind. App. 701.

There is nothing in the questions here sought to be reviewed to prevent the application of the general rule that the principles of law declared on the appeal of a case, so far as applicable, remain the law of the case on a subsequent appeal, and must be followed whether right or wrong. The case is in all respects controlled by the principles of law announced in the case of *Hancock v. Diamond Plate Glass Co.* (1906), 37 Ind. App. 351, and upon the authority of that case the judgment is affirmed.

**DIAMOND PLATE GLASS COMPANY ET AL. v. COVALT
ET AL.**

[No. 5,582. Filed June 8, 1906.]

From Grant Superior Court; *B. F. Harness*, Judge.

Suit by Deborah Covalt and others against the Diamond Plate Glass Company and others. From a decree for plaintiffs, defendants appeal. *Affirmed*.

Blackledge, Shirley & Wolf and *Bell & Purdum*, for appellants.
B. C. Moon, for appellees.

MYERS, J.—The errors assigned and argued in the brief of counsel for appellants in this case are the same as those considered and decided in *Diamond Plate Glass Co. v. Knots* (1906), *ante*, 20, and upon the authority of that case the judgment of the trial court is affirmed.

**CINCINNATI, RICHMOND & MUNCIE RAILROAD ET
AL. v. TROUTMAN ET AL.**

[No. 5,439. Filed January 2, 1906. Rehearing denied April 19, 1906. Transfer denied June 19, 1906.]

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Andrew Troutman and another against the Cincinnati, Richmond & Muncie Railroad and another. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Robbins & Starr and *Loveland & Loveland*, for appellants.
Cox, Reasoner & O'Hara and *Albert Ward*, for appellees.

BLACK, P. J.—The material questions in this case were decided adversely to the appellants in *Cincinnati, etc., Railroad v. Miller* (1905), 36 Ind. App. 26, and upon the authority of that case the judgment herein is affirmed.

**CARRELL v. MUNCIE, HARTFORD & FT. WAYNE
RAILWAY COMPANY.**

[No. 5,544. Filed June 20, 1906.]

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by the Muncie, Hartford & Ft. Wayne Railway Company against Samuel S. Carrell. From a judgment for plaintiff, defendant appeals. *Reversed*.

Diamond Plate Glass Co. v. Newhouse—38 Ind. App. 701.

George H. Koons, for appellant.

Cantwell & Simmons, for appellee.

BLACK, J.—The appellee instituted proceedings for the appropriation of a strip forty feet in width through agricultural lands of the appellant, for the construction of the appellee's "interurban street railroad," pursuant to the statute of March 11, 1901 (Acts 1901, p. 461, §5468a *et seq.* Burns 1901).

Among the instructions asked by the appellant which the court below refused to give to the jury was the following: "The court instructs the jury that in estimating the damages no deduction shall be made for any benefits that may arise or accrue to the landowner by the location, construction and operation of the road." Since the trial of this cause, the matter involved in this instruction has been examined by this court and has been decided contrary to the ruling here questioned. See *Indianapolis, etc., Traction Co. v. Dunn* (1906), 37 Ind. App. 248; *Indianapolis, etc., Traction Co. v. Ramer* (1906), 37 Ind. App. 264.

We do not find any reason for departing from the conclusion reached on this subject in those cases.

The principles and rules for the assessment of damages in such cases are well ascertained and explained in the decisions; and other questions suggested by counsel may, on another trial, present no difficulty, being approached with the understanding that it is the intention of the legislature that in such cases damages to the landowner should be assessed as in case of the appropriation of land for the use of a commercial railroad company.

Judgment reversed, and cause remanded for a new trial.

DIAMOND PLATE GLASS COMPANY ET AL. v. NEWHOUSE.

[No. 5,583. Filed June 28, 1906.]

From Grant Superior Court; B. F. Harness, Judge.

Suit by Isaac Newhouse against the Diamond Plate Glass Company and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Blackledge, Shirley & Wolf and Bell & Purdum, for appellants.
B. C. Moon, for appellee.

MYERS, J.—The questions presented by this appeal are the same as those considered and decided by this court in *Diamond Plate Glass Co. v. Knote* (1906), *ante*, 20, and upon the authority of that case the judgment in this cause is affirmed.

DIAMOND PLATE GLASS COMPANY ET AL. v. DEAN.

[No. 5,584. Filed June 28, 1906.]

From Grant Superior Court; *B. F. Harness*, Judge.

Suit by Benjamin F. Dean against the Diamond Plate Glass Company and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Blacklidge, Shirley & Wolf and *Bell & Purdum*, for appellants.
B. C. Moon, for appellee.

MYERS, J.—The questions presented by this appeal are the same as those considered and decided by this court in *Diamond Plate Glass Co. v. Knots* (1906), *ante*, 20, and upon the authority of that case the judgment in this cause is affirmed.

**INDIANAPOLIS NORTHERN TRACTION COMPANY
v. SPURGEON.**

[No. 5,640. Filed October 4, 1906.]

From Howard Superior Court; *B. F. Harness*, Judge.

Action by Simeon Spurgeon against the Indianapolis Northern Traction Company and others. From a judgment for plaintiff, defendant traction company appeals. *Affirmed.*

James A. Van Osdol and *Blacklidge, Shirley & Wolf*, for appellant.

John W. Cooper and *Thomas S. Gerhart*, for appellee.

MYERS, J.—The pleadings, the facts and the questions reserved on the rulings of the court and presented in this case were considered and decided by this court in *Indianapolis, etc., Traction Co. v. Harbaugh* (1906), *ante*, 115, and upon the authority of that case the judgment herein is affirmed.

LINGENFELTER v. LINGENFELTER.

[No. 5,803. Filed October 11, 1906.]

From Shelby Circuit Court; *Will M. Sparks*, Judge.

Suit by Thomas J. Lingenfelter against Laura E. Lingenfelter. From a decree for defendant, plaintiff appeals. *Affirmed.*

J. B. McFadden, for appellant.

PER CURIAM.—The judgment is affirmed.

Elwood, etc., Oil Co. v. Etchison—38 Ind. App. 703.

ELWOOD NATURAL GAS & OIL COMPANY ET AL.
v. HUGHES.

[No. 5,934. Filed May 18, 1906. Rehearing denied October 12, 1906.]

From Madison Circuit Court; *Daniel W. Comstock*, Special Judge.

Suit by Mollie A. Hughes against the Elwood Natural Gas & Oil Company and others. From a decree for plaintiff, defendants appeal. *Reversed*.

Gilbert R. Call, for appellants.

Bartlett H. Campbell and *Ward L. Roach*, for appellee.

ROBINSON, J.—Suit by appellee asking a decree enjoining appellants from shutting off, or in any manner interfering with, appellee's supply of gas for domestic use. The controversy grows out of a written contract between appellee and appellants, under which appellee claimed, in consideration of \$75, the right to gas without further pay. Demurrer to the complaint overruled. Upon issues formed a trial resulted in a finding for appellee.

The errors assigned are, overruling the demurrer of each appellant to the complaint, and overruling the motion for a new trial.

The same questions presented in this case were decided by this court in *Elwood, etc., Oil Co. v. Glaspy* (1906), *ante*, 634, and upon the authority of that decision the judgment is reversed.

ELWOOD NATURAL GAS & OIL COMPANY ET AL.
v. ETCHISON.

[No. 5,935. Filed May 18, 1906. Rehearing denied October 12, 1906.]

From Madison Circuit Court; *Daniel W. Comstock*, Special Judge.

Suit by Henry Etchison against the Elwood Natural Gas & Oil Company and others. From a decree for plaintiff, defendants appeal. *Reversed*.

Gilbert R. Call, for appellants.

Bartlett H. Campbell and *Ward L. Roach*, for appellee.

BLACK, P. J.—Upon the authority of *Elwood, etc., Oil Co. v. Glaspy* (1906), *ante*, 634, the judgment herein is reversed, with instructions to sustain the demurrer of each of the appellants to the appellee's amended complaint.

INDEX.

[NOTE.—The citation *Bond v. May*, 396, 398 (1), indicates that the initial page of the case is 396, that the page on which the point cited is found is 398, and that the point cited begins at the marginal indentation numbered 1.]

ACCOUNT—

As to partnership accounting, see **PARTNERSHIP**, 1; *Bond v. May*, 396, 398 (1).

Unaccepted order for, not an assignment of, see **ASSIGNMENTS**; *Siegmund v. Kellogg-Mackey-Cameron Co.*, 95, 98 (5).

Taxes may be included in suit for redemption and an accounting, see **MORTGAGES**, 2; *Aetna Life Ins. Co. v. Stryker*, 312, 333 (18).

Accounting may be had of property held in trust, see **TRUSTS**, 5; *Holliday v. Perry*, 588, 599 (14).

Tenancy in Common. — Partnership. — Individual Debts. — A tenant in common may sue his cotenant for an accounting and have a decree without taking into account a debt of such cotenant for which the tenant is surety, the fact that such tenants each assisted in the conduct of the farm and that after their division thereof one of them managed both farms, giving to the other part of the net profits as rent, not constituting a genuine partnership. *Bond v. May*, 396, 399 (2).

ACKNOWLEDGMENT—

Defining of, as applied to illegitimate child, not an invasion of the province of the jury, see **TRIAL**, 12; *Daggy v. Wills*, 27, 29 (2).

ACTION—

See **LIMITATION OF ACTIONS**.

Brought in wrong county, waiver of defect, see **JURISDICTION**, 1; *Chicago, etc., R. Co. v. Marshall*, 217, 222 (1).

Death by Wrongful Act. — Mines. — Statutes. — Executors and Administrators. — Under §7473 Burns 1901, Acts 1891, p. 57, §13, a right of action for the death of a coal miner accrues to the widow, children, adopted children, parents or other dependents, and not to deceased's personal representatives. *Collins Coal Co. v. Hadley*, 637, 642 (2).

ALIENATION—

Suspending power of, see **WILLS**, 3; *Matlock v. Lock*, 281, 304 (3).

AMENDMENTS—

See **PLEADING**.

Briefs, on appeal, may be amended, see **APPEAL AND ERROR**, 14; *Stephens v. American Car, etc., Co.*, 414, 416 (1).

Assignment of errors, on appeal, may be amended, see **APPEAL AND ERROR**, 4; *Pierse v. Bronnenberg*, 655, 657 (2).

By *nunc pro tunc* entry may be made to the record pending appeal, see **TRIAL**, 1; *Cleveland, etc., R. Co. v. Porter*, 226, 228 (1).

AMENDMENTS—Continued.

To Objections Before Board.—Towns.—Elections.—It is not an abuse of discretion of the trial court to refuse an amendment to objections, filed before the board of commissioners, so as to show that the ballots, used in an election to determine whether a certain territory should be incorporated as a town, were prepared by the county board of election commissioners, such question not being raised before the board because objectors were ignorant thereof. *Fleener v. Johnson*, 334, 337 (2).

ANSWER—

See PLEADING.

APPEAL AND ERROR—

All defects amendable below, deemed amended on appeal, see PLEADING, 5; *Richardson v. Stephenson*, 339, 341 (2).

Appellate Court will direct vacation of prior judgment, where new trial as of right is granted, see QUIETING TITLE, 1; *Richardson v. Stephenson*, 339, 340 (1).

Sufficiency of complaint attacked for the first time on appeal, see PLEADING, 66; *Over v. Dehne*, 427, 431 (2).

Theory adopted on trial governs on appeal, see PLEADING, 59; *Holliday v. Perry*, 588, 598 (9).

Theory of case may be determined from briefs, see APPEAL AND ERROR, 39.

1. *Perfecting Appeal.—Time.—Notice.*—The filing of a transcript and assignment of errors on appeal within one year from the rendition of the judgment, perfects the appeal, as to the appellees, without the service of notice. *Tate v. Hamlin*, 149 Ind. 94, followed. *Nemitz v. State, ex rel.*, 509 (1).

2. *Boards of Commissioners.—General Statute for Appeals.—Rights Under.*—Under a general statute for appeals from the boards of commissioners, appeals may be taken, unless prohibited by some special statute, from any decision involving judicial action, but not from a decision involving administrative, ministerial or discretionary powers.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 455 (9).

3. *Boards of Commissioners.—Administrative Powers.—Appeals from.—Special Statute.*—Appeals may be taken from decisions of boards of commissioners on administrative, ministerial or discretionary matters where authorized by a special statute.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 455 (10).

4. *Assignment of Errors.—Amendment.—Dismissal.*—An assignment of errors naming an estate as appellee may be amended upon motion where appellees filed a brief on the merits and subsequently moved to dismiss the appeal, the appellant immediately after the making of such motion asking leave to amend. *Pierse v. Bronnenberg*, 655, 657 (2).

5. *Evidence.—Admission.—Joint Assignment.*—Where error is assigned upon the admission in evidence of exhibits one to nine, inclusive, if one was properly admitted, such error is not well taken. *Board, etc., v. Eaton*, 30, 32 (4).

6. *Assignment of Errors.—Demurrer to Complaint in Two Paragraphs.*—An assignment that the court erred in overruling a demurrer to a complaint is not well taken where such complaint is in three paragraphs and one of them is sufficient.

Rink v. Lowry, 132, 135 (1).

APPEAL AND ERROR—Continued.

7. *Joint Assignment.—Several Exceptions.*—Where appellants jointly assign as error the overruling of appellants' motion for a new trial, a part only joining in such motion, and those joining taking a several exception thereto, no question is presented on appeal. *Davy v. Brown*, 413.
8. *Bills of Exceptions.—Whether in Record.*—Where ninety days were given on April 11, in which to file bills of exceptions, and a bill was filed July 11, it was too late and consequently is not in the record, the rule being to exclude the day on which time was granted and to include the last day. *Lewis Tp. Improv. Co. v. Royer*, 151, 155 (8).
9. *Bills of Exceptions.—Duty of Judge to Correct Errors in.*—Under §641 Burns 1901, §629 R. S. 1881, providing that the judge shall correct and file bills of exceptions presented to him, his denial of the correctness of a statement in a bill is a sufficient correction thereof. *Indianapolis Traction, etc., Co. v. Grey*, 141, 142 (1).
10. *Briefs.—Waiver.*—Failure to discuss an alleged error in the brief on appeal waives such error. *Rudisell v. Jennings*, 403, 408 (7).
McCaslin v. State, 184, 185 (1).
Korporal v. Robinson, 110, 111 (1).
Western Union Tel. Co. v. McClelland, 578, 584 (5).
City of Indianapolis v. Mullally, 125, 132 (9).
11. *Briefs.—Waiver.—Court's Duty to Find Errors.*—It is not the duty of the Appellate Court to hunt up errors not pointed out in the briefs; and such errors not pointed out are waived. *Over v. Dehne*, 427, 430 (1).
12. *Briefs.—Dismissal of Appeal.*—The filing of a brief, by appellant, of less than one page and complying in no respect with Appellate Court rules, is ground for dismissal of such appeal. *Nemitz v. State, ex rel.*, 509, 511 (2).
13. *Appellate Court Rules.—Briefs.*—Where appellant has made a good-faith attempt to comply with Appellate Court rules in preparing his brief and has in his way presented in a substantial manner the errors relied upon, his appeal will not be dismissed. *Hall v. Terre Haute Electric Co.*, 43, 47 (4).
14. *Briefs.—Amendments.*—Where appellant fails to show in his brief that he excepted to the alleged erroneous ruling of the trial court, but by permission of the court he amends such brief to show such exception, the alleged error is properly presented. *Stephens v. American Car, etc., Co.*, 414, 416 (1).
15. *Rehearing.—Certiorari.*—A writ of *certiorari* will not be issued to correct the record after decision, for the purpose of a petition for a rehearing. *Aetna Life Ins. Co. v. Stryker*, 312, 326 (7).
16. *Writ of Certiorari.—Purpose.*—Appeals are prosecuted in this State under the provisions of the code and not by writ of *certiorari*. *Aetna Life Ins. Co. v. Stryker*, 312, 326 (8).
17. *Certiorari.—Title.—New Trial as of Right.—Rehearing.*—Where, pending an appeal, the defendants, in a suit to quiet title, file their motion for a new trial as of right, in the trial court, which motion is overruled, defendants cannot, after a decision on appeal of the former case, have the record of the overruling of such motion brought up by a writ of *certiorari*.

APPEAL AND ERROR—Continued.

- and have such overruling considered on a petition for a rehearing in the former case, such ruling being appealable independently. *Aetna Life Ins. Co. v. Stryker*, 312, 327 (9).
18. *Evidence.—Whether All in Record.—Necessity for.*—Where the decision of a case must, under the issues, turn upon an indisputable fact, whether other evidence on other questions is all in the record, is immaterial.
Harrah v. State, ex rel., 495, 506 (12).
19. *Injunction.—Power of Appellate Court.*—While the granting of a temporary injunction by the Appellate Court is ancillary to the litigation and is made to preserve the subject-matter thereof *in statu quo*, yet, the court will not grant same where the effect would be inequitable or wrongfully injurious.
State v. Board, etc., 52, 62 (3).
20. *Injunction.—By Appellate Court.—Rule.*—The Appellate Court before granting a temporary injunction will examine the whole record and if it plainly appear that the petitioner therefor will not be entitled on the final hearing to such relief, that fact will be considered in the decision on the motion for a temporary order.
State v. Board, etc., 52, 62 (4).
21. *Instructions.—Exceptions.*—Where no exceptions were taken to the giving of instructions, no questions can be raised thereon on appeal.
Indianapolis Traction, etc., Co. v. Grey, 141, 143 (2).
22. *Instructions.—Failure to Make Evidence Part of Record.*—Where appellant fails to make the evidence a part of the record, instructions will be presumed to be applicable to the evidence given.
People's State Bank v. Ruxer, 420, 422 (4).
23. *Instructions.—Not All in Record.—Presumptions.*—Where all instructions are not affirmatively shown to be in the record, the presumption is that erroneous ones were withdrawn or corrected by those omitted from the record.
People's State Bank v. Ruxer, 420, 422 (5).
24. *Interrogatories to Jury.—Request for.—Record.*—To raise any question on the court's refusal to submit interrogatories to the jury, the record must affirmatively show that they were submitted to the court before the argument of counsel began.
People's State Bank v. Ruxer, 420, 421 (3).
25. *Answers to Interrogatories to Jury.—Precipe.—Record.*—A precipe calling for "all entries of the trial in this cause" includes the answers to interrogatories to the jury, such answers being a part of the record without a bill of exceptions.
Lindley v. Kemp, 355, 358 (2).
26. *Precipe.—"Special Verdict."*—*Answers to Interrogatories to Jury.*—A precipe calling for the "special verdict" is sufficient to include the answers to the interrogatories to the jury, a liberal construction being given in such matters.
Lindley v. Kemp, 355, 359 (4).
27. *Final Judgment.—What is.*—A judgment in form: "It is therefore considered and adjudged by the court that the plaintiff pay the costs herein paid, laid out, and expended," is not final; and an appeal will not lie therefrom.
Miller v. McKean, 695.

APPEAL AND ERROR—Continued.

28. *Stare Decisis*.—Where valuable property rights are founded upon the rules of law laid down by the courts of last resort, such rights will be protected by the doctrine of *stare decisis*.
Diamond Plate Glass Co. v. Knots, 20, 25 (2).
29. *Stare Decisis*.—*Supreme Court*.—*Appellate Court*.—*Conflict*.—Where a gas lease was entered into prior to a decision of the Appellate Court and the lessee tried to terminate such lease according to such decision, but the Supreme Court decided that such lease could not be so determined, the lessee is in no position to invoke the rule of *stare decisis*, no rights being contracted on the ground of such decision.
Diamond Plate Glass Co. v. Knots, 20, 26 (3).
30. *Jurisdiction*.—*Void Statute*.—*Want of Jurisdiction in Trial Court*.—The Appellate Court has no jurisdiction to determine an appeal taken under a void statute or taken from the judgment of a trial court without any jurisdiction to render the judgment appealed from.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 448 (1).
31. *Complaint*.—*Initial Attack on Appeal*.—A complaint attacked for the first time on appeal will be held good if it states facts sufficient to bar another action.
Southern R. Co. v. Roach, 211, 215 (6).
Indianapolis Traction, etc., Co. v. Smith, 160, 165 (2).
Lewis Tp. Improv. Co. v. Royer, 151, 154 (2).
32. *Complaint*.—*Initial Attack on Appeal*.—A complaint will be considered sufficient when attacked for the first time on appeal, where it does not wholly fail to allege the material facts necessary to constitute a cause of action, mere uncertainty or inadequacy of averment being insufficient to render it bad.
Indianapolis Traction, etc., Co. v. Smith, 160, 164 (1).
33. *Complaint*.—*Paragraphs*.—*Judgment Resting on Good*.—Where a judgment appealed from affirmatively appears to rest on a good paragraph of a complaint, the overruling of a demurrer to a bad paragraph is not reversible error.
Bedford Quarries Co. v. Turner, 552, 557 (1).
34. *Questions Presented Twice*.—*Disposal of*.—A question, on appeal, decided on the sufficiency of the complaint will not be decided again on the ruling on a motion for a new trial.
Hobbs v. Town of Eaton, 628, 632 (6).
35. *Complaint*.—*Conclusions of Law*.—*When Same Questions Presented*.—Where the special findings show the same facts as alleged in the complaint, an exception to the conclusions of law presents the same questions as a demurrer to the complaint.
Indianapolis, etc., Traction Co. v. Harbaugh, 115, 116 (1).
36. *Answer*.—*Sustaining Demurrer*.—*Facts Provable under Another Paragraph*.—Where the facts contained in a paragraph of answer are provable under another paragraph, sustaining a demurrer thereto is harmless.
Richardson v. Stephenson, 339, 341 (4).
37. *Demurrer to Complaint*.—*Amended Complaint*.—A demurrer to the complaint raises no question where an amended complaint is on file.
Richardson v. Stephenson, 339, 341 (3).
38. *Right Result*.—Where the trial court reached the right result, its judgment will be affirmed.
Richardson v. Stephenson, 339, 341 (6).

APPEAL AND ERROR—Continued.

39. *Theory of Suit.—Record.—Evidence.—Briefs.*—The Appellate Court in ascertaining the theory of the complaint may consider the entire record, the evidence and the briefs of counsel.
Hobbs v. Town of Eaton, 628, 630 (1).
Aetna Life Ins. Co. v. Stryker, 312, 327 (10).
Indianapolis, etc., Traction Co. v. Harbaugh, 115, 117 (3).
41. *Reversal.—Questions Decided.*—Where the appellee's complaint is bad, and the judgment is reversed therefor, the Appellate Court need not decide other questions presented.
National Fire Proofing Co. v. Roper, 600, 607 (4).
42. *Trial.—Incompetent Evidence.*—The Appellate Court will not disturb a judgment resting upon incompetent evidence admitted without objection.
Littler v. Robinson, 104, 108 (2).
43. *Evidence.—Proof of a Fact Admitted.*—It is not harmful to admit evidence to prove a fact the truth of which is already admitted by the other party. *Board, etc., v. Eaton*, 30, 33 (6).
44. *Appellate Court.—Procedure.—Legislative Power.*—The legislature has the power to prescribe the procedure in cases in which it invests the Appellate Court with original jurisdiction.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 459 (14).
45. *Exceptions to Master Commissioner's Special Findings.—Request.*—Where a special finding was not required from a master commissioner, exceptions to his alleged special findings present no question. *Harrah v. State, ex rel.*, 495, 506 (11).
46. *Master Commissioner's Report.—Whether Part of Record without Bill of Exceptions.—Statutes.*—The report of the evidence and his findings by a master commissioner are a part of the record on appeal without any bill of exceptions, by virtue of Acts 1903, p. 338, §3, §641c Burns 1905; and the fact that the report was not all filed at the same time makes no difference.
Harrah v. State, ex rel., 495, 504 (9), 507 (9).
47. *Record.—Motion to Strike Out Sustained.—Statutes.*—A motion to strike out parts of a complaint, which fails to set out the parts to be eliminated, is not sufficient, under the act of 1903 (Acts 1903, p. 338, §2, §641b Burns 1905), and where the record shows such motion was sustained in part and overruled in part, but such motion is not brought into the record by a bill of exceptions, it cannot be considered. *Fairbank v. Lorig*, 4 Ind. App. 451; *DeKalb Nat. Bank v. Nicely*, 24 Ind. App. 147; *Union City, etc., Co. v. Jaqua*, 26 Ind. App. 160, overruled.
Lindley v. Kemp, 355, 357 (1).
48. *Independent Assignments.—New Trial.*—Questions which can be included in a motion for a new trial cannot be assigned independently on appeal.
Over v. Dehne, 427, 431 (3).
Hobbs v. Town of Eaton, 628, 634 (11).
49. *New Trial.—Time of Filing.*—Where a decree was made on April 28 and the term closed on April 30, a motion for a new trial filed June 29 was too late.
Richardson v. Stephenson, 339, 341 (5).
50. *Answers to Interrogatories.—New Trial.*—Where the record on appeal is such that the Appellate Court cannot say that

APPEAL AND ERROR—Continued.

plaintiff cannot recover, a new trial will be ordered, although technically the defendant would be entitled to judgment on the answers to the interrogatories to the jury.

New Castle Bridge Co. v. Steele, 194, 195 (2).

51. *Parties.—Decedents' Estates.—Assignment of Errors.*—An assignment of errors naming "Estate of Frederick Bronnenberg, deceased," as appellee, is insufficient.

Pierse v. Bronnenberg, 655, 656 (1).

52. *Judgment.—Death of Party.*—Where the death of a party is suggested, a judgment will be rendered as of the date of submission.

Home Ins. Co. v. Gagen, 680, 695 (17).
City of Indianapolis v. Mullally, 125, 132 (10).

53. *Trial.—Rulings.—Presumptions.*—Appellate courts will indulge all reasonable presumptions in favor of the rulings of the trial court.

Hobbs v. Town of Eaton, 628, 631 (2).

54. *Railroad Commission.—Rates.*—An appeal, under the railroad commission act (Acts 1905, p. 83, §6) to the Appellate Court can be taken only in cases where a party is dissatisfied with "any rate, classification, rule, charge or general regulation made, approved, adopted or ordered by the commission."

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 657, 658 (1).

55. *Railroad Crossings.—Railroad Commission.*—An appeal lies from an order of the railroad commission respecting the crossing of one railroad by another to the proper circuit or superior court, and then to the Appellate Court, but not to the Appellate Court in the first instance.

Grand Rapids, etc., R. Co. v. Railroad Com., etc., 657, 658 (2).

56. *Railroad Commission.—Special Statute.*—Appeals taken from the action of the railroad commission to the Appellate Court are taken under the special statute (Acts 1905, p. 83), and not under the general statutes providing for appeals.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 449 (2).

57. *Railroad Commission.—Motion to Dismiss Petition.*—The constitutional validity of the railroad commission law (Acts 1905, p. 83) will not be determined upon a motion in the Appellate Court to dismiss the petition before such commission, upon which the commission's action was founded. Wiley, J., *contra*.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 460 (16).

58. *Rehearing.—New Questions.*—Questions not raised before the decision of a case cannot be raised on a petition for a rehearing.

Aetna Life Ins. Co. v. Stryker, 312, 333 (19).

59. *Joint and Several Exceptions.—Erroneous Ruling Precedent.—Transfer.*—Where the Appellate Court deems a ruling precedent, holding a certain exception to a ruling joint and that no question can be presented by a several assignment thereon, erroneous, the cause will be transferred to the Supreme Court.

Bessler v. Laughlin, 14.

60. *Erroneous Ruling Precedent.—Transfer.*—Where a ruling precedent of the Supreme Court is deemed erroneous, the Appellate Court will transfer the cause to the Supreme Court with a recommendation that such precedent be overruled.

Staser v. Gaar, Scott & Co., 696, 699 (4).

APPEAL AND ERROR—Continued.

61. *Removal of Causes.—Overruling Petition for.—Assignment.—New Trial.*—The overruling of a petition to remove a cause to the federal court cannot be assigned as error independently on appeal, but must be made a ground for a new trial.
Southern R. Co. v. Roach, 211, 218 (1).
62. *Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence.
Never-Split Seat Co. v. Climax Specialty Co., 616 (1).
Stevens v. Wooderson, 617, 619 (3).
Heard v. State, 511, 513 (3).
Over v. Dehne, 427, 435 (7), 437 (7).
Home Ins. Co. v. Gagen, 680, 694 (16).
Grand Lodge, etc., v. Barwe, 303, 310 (1).
City of Indianapolis v. Mullally, 125, 131 (6).
Daggy v. Wells, 27, 30 (3).
Hobbs v. Town of Eaton, 628, 633 (10).
63. *Weighing Evidence.—Bills and Notes.*—The Appellate Court will not weigh conflicting evidence to overthrow the trial court's finding that the note in suit was not a renewal of a former note.
Polley v. Pogue, 678, 679 (1).
Board, etc., v. Eaton, 30, 32 (2).
65. *Weighing Evidence.—Railroads.—Signals.—Question for Jury.*—Where the evidence as to a railroad company's sounding its whistle at a highway crossing is conflicting, the verdict is conclusive on appeal.
New York, etc., R. Co. v. Robbins, 172, 176 (2).
66. *Weighing Evidence.—Railroads.—Fences.—Sufficiency of, to Turn Stock.—Question for Jury.*—Whether a fence repaired by a railroad company along its right of way is sufficient to turn stock as required by §5325 Burns 1901, Acts 1885, p. 224, §3, is a question of fact for the jury, and its verdict is conclusive on appeal where the evidence is conflicting.
Chicago, etc., R. Co. v. Irons, 196, 197 (2).
67. *Weighing Evidence.—Street Railroads.—Negligence.—Contributory.—Question for Jury.*—Where the evidence was conflicting whether the defendant street railroad company was negligent in failing to see and avoid injury to plaintiff while driving a heavily loaded wagon on its track on a narrow street, and whether plaintiff was guilty of contributory negligence in going on such street, the verdict is conclusive on appeal.
Indianapolis Traction, etc., Co. v. Smith, 160, 166 (5).

APPEARANCE—

See PLEADING.

APPELLATE COURT—

See COURTS.

ASSAULT—

See ATTEMPTS; CRIMINAL LAW.

ASSIGNMENT OF ERRORS—

See APPEAL AND ERROR.

ASSIGNMENTS—

Choses in Action.—*Balance Due on Building Contract.*—An unaccepted order by the contractor to the owner of a building for such owner to pay a balance due such contractor to the plaintiff, is not an assignment of such amount.

Siegmund v. Kellogg-Mackay-Cameron Co., 95, 98 (5).

ASSUMPTION OF RISK—

See MASTER AND SERVANT.

ATTEMPTS—

1. *Provoke.*—*Assault.*—*Intent.*—*Evidence.*—Intent is an essential element of the offense of attempting to provoke an assault, and may be proved either by positive or circumstantial evidence.

Heard v. State, 511, 512 (1).

2. *Intent.*—*Evidence.*—Where language used by the defendant, together with his conduct, was capable of an inference that defendant, who had the present ability, was threatening the prosecuting witness with personal violence, a conviction for attempt to provoke an assault is justifiable.

Heard v. State, 511, 512 (2).

ATTORNEY AND CLIENT—

Recovery of attorneys' fees in fence lien cases, see RAILROADS, 1, 5; *Chicago, etc., R. Co. v. Irons*, 196, 198 (3); *Terre Haute, etc., R. Co. v. Salisbury*, 100, 103 (3).

Sufficiency of evidence to establish fees of attorney in fence building case, see NEW TRIAL, 9; *Terre Haute, etc., R. Co. v. Salisbury*, 100, 103 (2).

Mechanic's lien notice signed in name of lienor, by his attorney, sufficient, see MECHANICS' LIENS, 1; *Siegmund v. Kellogg-Mackay-Cameron Co.*, 95, 97 (1).

BASTARDY—

See ILLEGITIMATE CHILDREN.

BILL OF EXCEPTIONS—

See APPEAL AND ERROR.

BILLS AND NOTES—

As to judgment where wife is principal as to part and surety as to balance, see JUDGMENT, 3; *Rudisell v. Jennings*, 403, 406 (4).

Containing without relief provision demand judgment with such provision, see JUDGMENT, 1; *Polley v. Pogue*, 678, 679 (3).

Given for insurance policy, may be enforced so far as earned before cancelation of policy, see INSURANCE, 3; *Ohio Farmers Ins. Co. v. Hunter*, 11, 14 (3).

Given for payment of premium does not prevent lapse, if note is not paid at maturity, where so conditioned, see INSURANCE, 9; *Union Mut. Life Ins. Co. v. Adler*, 530, 539 (7), 540 (7).

1. *Negotiable.*—*Payment.*—*Presumptions.*—There is a disputable presumption that a negotiable note is a payment of the debt for which it was given.

Union Mut. Life Ins. Co. v. Adler, 530, 539 (6).

BILLS AND NOTES—Continued.

2. *Extension of Time of Maturity.—Consideration.—Trusts.*—Where the maker of a note drawing eight per cent interest until paid, four days before maturity, assigned his interest in certain trust funds to secure the payment of the principal of such note with interest at seven per cent, authorizing the trustee to pay such note "if the same shall not be paid before a final distribution" of such funds, the payee is entitled before the distribution of such funds to a personal judgment for such principal and eight per cent interest and to a lien on such trust funds for such principal and seven per cent interest, which lien is enforceable at the distribution of such funds, no consideration being shown for the reduction of the rate of interest and no agreement appearing for any definite extension of the time for the payment of such note. *Agnew v. Agnew*, 16.

BOARDS OF COMMISSIONERS—

See COUNTIES; COURTS.

Courts.—Nunc pro tunc Entries.—Notice.—The board of commissioners has the power to make a *nunc pro tunc* entry in a proceeding pending before it without giving notice to the parties thereto. *Fleener v. Johnson*, 334, 336 (1).

BOUNDARIES—

Surveys.—Evidence of Title.—An official survey by a county surveyor is *prima facie* evidence of the corners and lines so located. *Korporal v. Robinson*, 110, 114 (4).

BURDEN OF PROOF—

See TRIAL.

CANADA THISTLES—

See INDICTMENT AND INFORMATION.

CANCELATION—

Of insurance policy, see INSURANCE.

CARRIERS—

See INTERURBAN RAILROADS; NEGLIGENCE; RAILROADS; STREET RAILROADS; TRIAL.

1. *Railroads.—Platforms.—Approaches.—Care Required.*—Railroads are required to use ordinary care only in keeping their platforms and approaches in a safe condition for passengers. *Pittsburgh, etc., R. Co. v. Harris*, 77, 78 (2).
2. *Railroads.—Passenger Alighting from Moving Train.—Contributory Negligence.*—A passenger who, in the darkness, alights from a moving train without any effort to ascertain its speed, and sustains injuries thereby, where sufficient time was given for her to alight while the train was stopped, is guilty of such contributory negligence as precludes a recovery. *Dunning v. Lake Erie, etc., R. Co.*, 91.
3. *Passengers.—Railroads.—"Shipper's Pass."*—A person in charge of live stock, riding on a "shipper's pass" on a freight-train, is a passenger for hire. *Southern R. Co. v. Roach*, 211, 215 (4).

CARRIERS—Continued.

4. *Railroads.—Care Toward Passengers.—*Slight negligence on the part of the carrier renders such carrier liable to a passenger injured without his own fault.
Cincinnati, etc., R. Co. v. Bravard, 422, 426 (3).
5. *Railroads.—Injuries to Passengers.—Burden of Proof.—*Where the passenger shows injuries caused by the carrier, such carrier, to escape liability, must show that such injuries could not have been avoided by the highest practicable care.
Cincinnati, etc., R. Co. v. Bravard, 422, 426 (4).
6. *Railroads.—Coach Leaving Track.—Res Ipsa Loquitur.—Burden of Proof.—*The doctrine of *res ipsa loquitur* applies to an injury, received by a passenger on a railroad and caused by the trucks of plaintiff's coach leaving the track, the burden being upon defendant to show clearly by the evidence that such cause was unavoidable.
Cincinnati, etc., R. Co. v. Bravard, 422, 426 (5).

CASES—

Table of cases cited, see p. vii.

DISTINGUISHED:

- Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357, see *Collins Coal Co. v. Hadley*, 637, 652 (5).
President, etc., v. Bradshaw, 6 Ind. 146, see *Collins Coal Co. v. Hadley*, 637, 652 (5).
Southern R. Co. v. Jones, 33 Ind. App. 333, see *New York, etc., R. Co. v. Robbins*, 172, 174 (1).
State v. Atkinson, 139 Ind. 426, see *State v. Shelton*, 80, 87 (6).

FOLLOWED:

- Board, etc., v. Crone*, 36 Ind. App. 283, see *Board, etc., v. Eaton*, 30, 32 (1).
Hancock v. Diamond Plate Glass Co., 162 Ind. 146, see *Diamond Plate Glass Co. v. Knot*, 20, 21 (1).
Reese v. Western Union Tel. Co., 123 Ind. 294, see *Western Union Tel. Co. v. Sefrit*, 565, 567 (2).
Tate v. Hamlin, 149 Ind. 94, see *Nemitz v. State, ex rel.*, 509 (1).
Terre Haute, etc., R. Co. v. Salisbury, ante, 100, see *Chicago, etc., R. Co. v. Irons*, 196, 198 (3).
Townsend v. Meneley, 37 Ind. App. 127, see *Daggy v. Wells*, 27, 28 (1).
Voris v. Pittsburg Plate Glass Co., 163 Ind. 599, see *Cleveland, etc., R. Co. v. Porter*, 226, 228 (3), (4).
Western Union Tel. Co. v. Braxtan, 165 Ind. 165, see *Western Union Tel. Co. v. Sefrit*, 565, 567 (1).

OVERRULED:

- De Kalb Nat. Bank v. Nicely*, 24 Ind. App. 147, see *Lindley v. Kemp*, 355, 357 (1).
Fairbank v. Lorig, 4 Ind. App. 451, see *Lindley v. Kemp*, 355, 357 (1).
Union City, etc., Co. v. Jaqua, 26 Ind. App. 160, see *Lindley v. Kemp*, 355, 357 (1).

QUESTIONED:

- Haggerty v. Wagner*, 148 Ind. 625, see *Staser v. Gaar, Scott & Co.*, 696, 698 (3).

CAVEAT EMPTOR—

Applies to judicial sales, see JUDICIAL SALES, 5; *Van Buskirk v. Summitville Min. Co.*, 198, 200 (2).

CEMETERIES—

As such, not subject to taxation, see CONSTITUTIONAL LAW, 7, 8; *Oak Hill Cemetery Co. v. Wells*, 479, 481 (1), (2).

Kept for sale for profit, subject to taxation, see TAXATION, 3; *Oak Hill Cemetery Co. v. Wells*, 479, 482 (4).

CERTIORARI—

Writ of, will issue to correct record on appeal, see APPEAL AND ERROR, 15, 16; *Aetna Life Ins. Co. v. Stryker*, 312, 326 (7), (8).

Does not lie to bring up record of subsequent ruling on motion for a new trial as of right, so as to have such ruling considered on rehearing of prior appeal, see APPEAL AND ERROR, 17; *Aetna Life Ins. Co. v. Stryker*, 312, 327 (9).

CHATTEL MORTGAGES—

Form of decree where indefinite description, see JUDGMENT, 4; *Rudisell v. Jennings*, 403, 408 (6).

Parol evidence admissible to identify property covered by, see EVIDENCE, 3; *Rudisell v. Jennings*, 403, 413 (8).

Complaint on notes and chattel mortgage good, though description of property insufficient, see PLEADING, 33; *Rudisell v. Jennings*, 403, 406 (3).

Description of Property. — Indefinite. — Complaint. — A chattel mortgage of "two Jersey cows, three and five years old; three work horses, age eight years and nine years; one farm wagon," etc., is good as between the parties; and a complaint for foreclosure specifically describing such property is not subject to a demurrer. *Rudisell v. Jennings*, 403, 406 (2), 408 (2).

CHILDREN—

See ILLEGITIMATE CHILDREN.

Right to alienate father's land, while mother is alive and remarried, see DESCENT AND DISTRIBUTION, 5; *Pence v. Long*, 63, 74 (6).

CITIES—

See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—

See JUDGMENT.

COMPLAINT—

See PLEADING.

CONCLUSIONS OF LAW—

See TRIAL.

Exceptions to, when taken, see TRIAL, 43; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 120 (5).

CONSIDERATION—

See **BILLS AND NOTES; CONTRACTS; SALES.**

CONSPIRACY—

See **FRAUD.**

CONSTITUTIONAL LAW—

See **STATUTES.**

Statute providing for sale of merchandise in bulk, unconstitutional, see **PLEADING**, 52; *Kingan & Co. v. Orem*, 207, 210 (2).

Validity of railroad commission act will not be determined on motion to dismiss appeal from the commission, see **APPEAL AND ERROR**, 57; *Chicago, etc., R. Co. v. Railroad Com., etc.*, 439, 460 (16).

1. *Eminent Domain.—Damages.—Delegation of Power.*—The legislature cannot delegate the power of eminent domain so as to take property without compensation.

Lewis Tp. Improv. Co. v. Royer, 151, 155 (6).

2. *Railroads.—Fences.—Police Power.*—The legislature may, in the exercise of the police power, compel railroad companies to fence their rights of way.

Chicago, etc., R. Co. v. Irons, 196, 197 (1).

3. *Fourth Coördinate Department of Government.—Power of Legislature to Create.—Railroad Commission.*—The legislature has no power to create a fourth coördinate department of government; and the powers of the railroad commission (Acts 1905, p. 83) are neither wholly legislative nor executive, but partly quasi-judicial.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 452 (7).

4. *Appellate Court.—Original Jurisdiction.*—The Appellate Court, established by the legislature, may be invested with original jurisdiction.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 457 (12).

5. *Appellate Court.—Railroad Commission.—Rates.*—While the legislature may not prescribe administrative duties for the courts as such to perform, still, the question of the reasonableness of a railroad rate, fixed by the railroad commission, being a judicial question, the determination of such question may properly be lodged in the Appellate Court.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 457 (13).

6. *Courts.—Delegation of Power to Non-Judicial Body to Hear Evidence and Report Decision.*—The legislature has power to delegate to the railroad commission the power to hear the evidence and render its decision on the question of the reasonableness of a railroad rate, and such decision on such question does not preclude the Appellate Court from an examination and determination of such question from such evidence, such proceeding being analogous to that of a master commissioner.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 459 (15).

7. *Taxation.—Exemptions.—Powers of Legislature.*—The legislature has no power to exempt property from taxation which is not exempted by the Constitution.

Oak Hill Cemetery Co. v. Wells, 479, 481 (1).

8. *Taxation.—Cemeteries.*—The framers of the Constitution did not look upon the family burying-ground nor the churchyard as property, and such are exempt from taxation within the spirit of the Constitution.

Oak Hill Cemetery Co. v. Wells, 479, 481 (2).

CONSTRUCTION—

See STATUTES.

CONTRACTS—

See INSURANCE; MONOPOLIES; PLEADING, 6, 7; SALES; VENDOR AND PURCHASER.

Plaintiff cannot aggravate damages caused by defendant's breach of, see DAMAGES, 3; *Cromer v. City of Logansport*, 661, 669 (6).

To fence right of way runs with the land, see COVENANTS; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 121 (6).

By city to aid manufactory, void as against public policy, see MUNICIPAL CORPORATIONS, 5, 6; *Collier Shovel, etc., Co. v. City of Washington*, 370, 375 (5), (6).

1. *Construction.—Enforcement.*—Contracts should be enforced according to the intention reasonably deduced from the language thereof. *Cool v. McDill*, 621, 623 (4).
2. *Construction.—Interpretation.*—In the construction thereof a contract should be considered as a whole; and the evidence may be considered, as giving a correct viewpoint for its interpretation, not for the purpose of changing the contract but of enforcing it in its true intent. *Cool v. McDill*, 621, 623 (5).
3. *Not to Engage in Business.—Clerkship.*—A contract by a person dealing in second-hand goods "not to engage in the business of conducting a second-hand store or to buy or sell second-hand goods" in his home city, does not prevent him from clerking for another dealer in second-hand goods in such city. *Cool v. McDill*, 621, 624 (6).
4. *Municipal Corporations.—Aids to Private Enterprises.—Bonds to Repay on Default of Conditions.*—A bond given to reimburse a town for the failure of a manufacturing company to locate and run its factory for a certain time in consideration of a bonus paid by such town is void and unenforceable. *Collier Shovel, etc., Co. v. City of Washington*, 370, 374 (3).
5. *Illegal.—Protection of One Party.—Enforcement.*—Where contracts are declared illegal, and the purpose is simply to protect one of the parties, courts may grant relief or even enforce the agreement at the suit of the party to be protected. *Collier Shovel, etc., Co. v. City of Washington*, 370, 374 (4).
6. *Monopolies.—Public-Service Corporations.*—A contract between public-service corporations, creating a monopoly, is void. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 238 (2).
7. *Monopolies.—Validity.—Burden of Showing.—Prima facie* a monopolistic contract is invalid, the burden of showing it to be valid being upon the party claiming thereunder. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 239 (3).
8. *Railroads.—Depots.—Sidings.—Switches.—Freight.*—While a railroad company has the right to purchase lands for a right of way, location of depots and sidings, and is bound to carry freight offered at such depots and stopping places, such company cannot legally contract not to establish a depot, siding or switch at a particular place. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 239 (4).
9. *Ultra Vires.—Illegal.—Retention of Benefits.—Estoppel.*—The doctrine that a public-service corporation cannot retain the benefits of an *ultra vires* contract and deny the validity thereof does not apply to contracts forbidden by statute or those contrary to public policy. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 240 (5).

CONTRACTS—Continued.

10. *Indivisible.—Partly Invalid.*—Indivisible contracts, partly illegal, and divisible promises, partly illegal, made for indivisible considerations, are wholly void.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 241 (6).
11. *Invalid. — Executory. — Executed.—Relief.*—The court will not interfere at the suit of either party to an invalid executory contract, but will leave the parties to a partly or wholly executed contract where they have placed themselves.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 242 (7).
12. *Indivisible.—Suit to Enforce Legal Part.*—A suit cannot be maintained to enforce the legal provisions of an invalid, indivisible contract.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 243 (8).
13. *Invalid.—Enforcement of Valid Part.*—The court will not enforce the valid provisions of an invalid, indivisible contract and wait for the decision upon the invalid parts thereof until plaintiff affirmatively asks relief on such provisions.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 244 (9).
14. *Consideration.—When May Be Contradicted.*—The consideration of a contract cannot be varied by parol when it is made contractual.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 245 (10).
15. *Construction.—Intention.*—Where the intention of the parties to a contract is clear from the language, it prevails and construction is unnecessary.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 246 (11).
16. *Monopolies.—Railroads.*—A contract by which one railroad company restricts its right to compete with another, in consideration of its being permitted to lay its tracks across the tracks of such other, is void.
Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 246 (12).

CONTRIBUTORY NEGLIGENCE—

See CARRIERS; NEGLIGENCE.

Not the subject of peremptory instruction, see TRIAL, 14; *Hall v. Terre Haute Electric Co., 43, 46 (2).*

CONVEYANCES—

See DEEDS.

CORPORATIONS—

See CONTRACTS.

COUNTERCLAIM—

Refusal to permit filing of, when case is ready for trial, discretionary with trial court, see TRIAL, 5; *Siebe v. Heilman Machine Works, 37, 38 (1).*

COUNTIES—

1. *Allowance of Claims.—Failure to Present.—Defense.—Evidence.*—In an action against a county the claimant's failure to present his claim to the board of commissioners is a defense which must be pleaded and proved, and where not pleaded evidence in support of such contention is not admissible.
Board, etc., v. Eaton, 30, 32 (3).

COUNTIES—Continued.

2. *Court-Houses.—Unauthorized Erection.—Title.*—Where the county in good faith, but without legal authority, partially erected a court-house and paid for such part, such unfinished structure will be considered as at the disposal of the county.
State v. Board, etc., 52, 59 (1).

COURT-HOUSES—

See COUNTIES; INJUNCTION.

COURTS—

See JUDGES.

Appellate Court may be invested with original jurisdiction, see CONSTITUTIONAL LAW, 4; *Chicago, etc., R. Co. v. Railroad Com., etc.*, 439, 457 (12).

Boards of commissioners may make *nunc pro tunc* entries, see BOARDS OF COMMISSIONERS; *Fleener v. Johnson*, 334, 336 (1).

Transfer of cases from Appellate to Supreme Court, see APPEAL AND ERROR, 59, 60.

Legislature may prescribe procedure in Appellate Court in cases of original jurisdiction, see APPEAL AND ERROR, 44; *Chicago, etc., R. Co. v. Railroad Com., etc.*, 439, 459 (14).

Duty of trial judge to correct bills of exceptions, see APPEAL AND ERROR, 9; *Indianapolis Traction, etc., Co. v. Grey*, 141, 142 (1).

Appeals from boards of commissioners, see APPEAL AND ERROR, 2, 3; *Chicago, etc., R. Co. v. Railroad Com., etc.*, 439, 455 (9). (10).

Objections not raised before board of commissioners cannot ordinarily be raised on appeal to circuit court, see AMENDMENTS; *Fleener v. Johnson*, 334, 337 (2).

Appellate.—Jurisdiction.—Original.—Prior to 1905 (Acts 1905, p. 83) the Appellate Court was never invested with original jurisdiction.

Chicago, etc., R. Co. v. Railroad Com., etc., 439, 456 (11).

COVENANTS—

See CONTRACTS; DEEDS.

Executory.—Running with the Land.—A contract by an inter-urban railroad company to fence its right of way runs in favor of the lessee of the covenantee's grantee, and such company is liable to him for the death of his cow caused by its failure to fence, though such contract was executory and the deed to such right of way, therein contracted for, had not been executed.

Indianapolis, etc., Traction Co. v. Harbaugh, 115, 121 (6).

CRIMINAL LAW—

See ATTEMPTS; INDICTMENT AND INFORMATION; STATUTES.

Evidence to convict for attempt to provoke an assault, see ATTEMPTS, 1, 2; *Heard v. State*, 511, 512 (1), (2).

DAMAGES—

Assessment of, for construction of a levee, see LEVEES; *Lewis Tp. Improv. Co. v. Royer*, 151, 154 (4).

Complaint for assessment of, see PLEADING, 26; *Lewis Tp. Improv. Co. v. Royer*, 151, 155 (7).

DAMAGES—Continued.

Measure of, for breach of contract of sale where vendor retains title, see **SALES**, 7; *Gaar, Scott & Co. v. Fleahman*, 490, 492 (3).

Aggravation of, burden of proof on defendant, see **TRIAL**, 4; *Cromer v. City of Logansport*, 661, 671 (10).

Items of, in damage cases, surplusage, where special findings not called for, see **TRIAL**, 60; *Over v. Dehne*, 427, 435 (8).

Special not recoverable, where general, only, are alleged, see **TRIAL**, 32; *Union Traction Co. v. Sullivan*, 513, 527 (9).

1. *Excessive*.—Where there is nothing to indicate that the jury was improperly influenced by prejudice or partiality, the damages assessed will not be considered excessive.

Indianapolis Traction, etc., Co. v. Smith, 160, 172 (11).

2. *Aggravation of, by Injured Party.—Mitigation.—Evidence*.—A person injured by the negligence of another must use reasonable care to prevent the increase of damages caused thereby, the failure to use such care being matter in mitigation.

Cromer v. City of Logansport, 661, 669 (4), 670 (4).

3. *Aggravation.—Contracts.—Torts*.—The rule that plaintiffs must use reasonable care to prevent any increase in damages caused by defendant's negligence, applies to actions on contract as well as in tort; and damages so caused must be borne by plaintiffs.

Cromer v. City of Logansport, 661, 669 (6).

4. *Aggravation.—Avoidance of.—Expenses.—Costs*.—Reasonable expenses laid out to prevent the increase of damages negligently caused by defendant are collectible from defendant.

Cromer v. City of Logansport, 661, 670 (7).

5. *Measure of.—Costs of Repair*.—In some cases the cost of repair of injuries caused by defendant's negligence is the measure of damages, subsequent increased damages caused by plaintiff's failure to repair being chargeable to plaintiff.

Cromer v. City of Logansport, 661, 670 (8).

6. *Duty to Avoid Increase.—Notice.—Knowledge of the injury* on the part of plaintiff is necessary in order to establish the duty to avoid an increase of damages negligently caused, there being no requirement that plaintiff shall anticipate injuries, even though they are threatened.

Cromer v. City of Logansport, 661, 670 (9).

DECEASED ESTATES—

Not a proper party, see **APPEAL AND ERROR**, 51; *Pierse v. Bronnenberg*, 655, 656 (1).

Administrator of deceased partner's estate, proper relator, in action on surviving partner's bond, see **PARTNERSHIP**, 5; *Harrah v. State, ex rel.*, 495, 502 (4).

1. *Executors and Administrators.—Final Settlement*.—The filing of a final report and the giving of notice thereof confer jurisdiction upon the court to hear and determine the matters involved in such report.

Mefford v. Lamkin, 33, 35 (1).

2. *Distribution*.—A judgment approving an administrator's final report is conclusive so long as it stands, and it is immaterial whether the administrator distributes the money directly or procures an order to pay it to the clerk for designated persons, such order being a part of the final settlement.

Mefford v. Lamkin, 33, 35 (2).

3. *Final Settlement.—Setting Aside.—Conversion.*—A final settlement, based upon an administrator's final report showing that such administrator and another were the only heirs, when in fact they were not heirs but another party was the only heir, will be set aside whether distribution was made directly by such administrator or whether an order was procured to pay the funds to the clerk and for such clerk to pay to such persons, whether such money was converted or is still in the hands of the clerk being immaterial.
Mefford v. Lamkin, 33, 36 (3), 37 (3).
4. *Administration.—What Is.*—Administration upon the estate of a decedent imports a reduction of such decedent's estate to money, the payment of his debts and a distribution of the proceeds to those legally entitled thereto.
Mefford v. Lamkin, 33, 36 (4).

DECEIT—

See FRAUD.

DEEDS—

See JUDICIAL SALES.

By remarrying widow and part of children, see DESCENT AND DISTRIBUTION, 2-5; *Pence v. Long*, 63.

Failure of the special findings to show kind of, raises presumption of quitclaim, see TRIAL, 51; *Aetna Life Ins. Co. v. Stryker*, 312, 332 (16).

Grantor in warranty deed, estopped to claim after-acquired title to property, see ESTOPPEL, 1; *Pence v. Long*, 63, 76 (13).

Setting aside for fraud, see FRAUDULENT CONVEYANCES; *Shipley v. Shipley*, 48, 52 (2).

Covenants to fence run in favor of tenant, see INTERURBAN RAILROADS; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 117 (4).

1. *Descent and Distribution.—Remarrying Widow.—Statutes.*—Under §2641 Burns 1901, §2484 R. S. 1881, a remarrying widow and a part only of the children of her former marriage cannot convey any part of her one-third interest in the former husband's real estate; and their warranty deed thereof creates no estoppel against those so joining therein.

Pence v. Long, 63, 75 (12).

2. *Description.—Lands Included.*—A quitclaim deed of fifty acres off of the south side of a tract of land includes an eighty-foot strip off of the south side thereof theretofore conveyed to a railroad company "for the purpose of constructing thereon and maintaining a railroad and appurtenances thereto."

Korporal v. Robinson, 110, 111 (2).

3. *Quitclaim.—Notice.*—A quitclaim deed conveys only the interest of the grantor in the described lands, and is notice to the grantee of a defective title.

Korporal v. Robinson, 110, 113 (3).

4. *Void.—Disaffirmance.*—A void deed needs no disaffirmance.
Aetna Life Ins. Co. v. Stryker, 312, 324 (5), 328 (5).

5. *Quitclaim.—Warranty.—Notice.*—A quitclaim deed is, but a warranty deed is not, notice to the purchaser sufficient to put him on inquiry as to defects in the title.

Aetna Life Ins. Co. v. Stryker, 312, 331 (15).

DEMURRER—

See PLEADING.

DESCENT AND DISTRIBUTION—

See DECEDENTS' ESTATE.

Effect of partition on lands held by remarrying widow, see JUDGMENT, 8; *Pence v. Long*, 63, 75 (11).

Legal widow takes statutory rights in husband's property, though he was illegally married to another person, see HUSBAND AND WIFE, 4; *Stevens v. Wooderson*, 617, 620 (4).

Remarrying widow and part of children cannot alienate lands of former husband, see DEEDS, 1; *Pence v. Long*, 63, 75 (12).

1. *Illegitimate Children.—Evidence.—Acknowledgment.—Statutes.*—An acknowledgment, prior to the taking effect of the act of 1901 (Acts 1901, p. 288, §2630a Burns 1901), of the paternity of an illegitimate child, is sufficient to enable such child to inherit under such statute. *Townsend v. Meneley*, 37 Ind. App. 127, followed. *Daggy v. Wells*, 27, 28 (1).

2. *Widow Remarrying.—Alienation of Real Estate.—Statutes.*—Under the act of 1852 (1 R. S. 1852, p. 248, §18, 1 G. & H., p. 294) a widow remarrying could not alienate her real estate descending from her former husband; and at her death such lands descended to the children of such former marriage.

Pence v. Long, 63, 72 (2).

3. *Widow Remarrying.—Alienation of Real Estate.—Statutes.*—Under the act of 1879 (Acts 1879 [s. s.], p. 123, §2484 R. S. 1881, §2641 Burns 1901) a widow remarrying cannot alienate real estate inherited from a former husband unless her husband and all children of such former marriage, who must all be over 21 years old, join in the conveyance; and at her death such land, if not thus alienated, descends to such children.

Pence v. Long, 63, 73 (3).

4. *Widow.—Rights in Husband's Real Property.*—Under the act of 1852 (1 R. S. 1852, p. 248, §27, §2491 R. S. 1881, §2652 Burns 1901) the surviving widow inherits in fee simple one-third of her deceased husband's real estate, which she may dispose of during widowhood, but she cannot alienate such lands during a remarriage.

Pence v. Long, 63, 74 (5).

5. *Widow Remarrying.—Rights of Children During Such Marriage.*—The children of the marriage with a former husband from whom the remarrying widow inherited lands have no interest in such widow's portion during her life.

Pence v. Long, 63, 74 (6).

DETERMINABLE FEE—

What constitutes, see WILLS, 2; *Matlock v. Lock*, 281, 293 (2).

DEVICE—

Meaning of, see WORDS AND PHRASES, 4; *Collins v. State*, 625, 626 (1).

DISAFFIRMANCE—

Void deed does not need, see DEEDS, 4; *Aetna Life Ins. Co. v. Stryker*, 312, 324 (5), 328 (5).

DIVORCE—

1. *Cruel Treatment.—Evidence.—Appeal and Error.*—In a suit for divorce where the parties are both young and the alleged cruel treatment as shown by the evidence consisted of small disputes and bickerings caused largely by foolish and stubborn pride and by the husband's failure to make allowances for the weaknesses of his young wife, the refusal of the trial court to grant such husband a divorce will not be disturbed on appeal.
Darman v. Darman, 279.
2. *Residence. — Jurisdiction. — Statutes.*—Under §1043 Burns 1901, §1031 R. S. 1881, it is necessary, in order to give the court jurisdiction to decree a divorce, that the residence of the plaintiff within the State for at least two years previous to the filing of the petition shall be established by two witnesses who are freeholders and householders of the State.
West v. West, 659, 660 (1).
3. *Residence.—New Trial.—Evidence.—Sufficiency.*—Where the plaintiff in a divorce suit proved by one of her witnesses as to residence that she had been a resident for two years prior to the trial, and not two years prior to the filing of her petition, the evidence is insufficient. *West v. West*, 659, 660 (2).

EASEMENTS—

By prescription cannot be gained to operate a nuisance, see NUISANCE; *Over v. Dehne*, 427, 431 (5), 438 (5).

EJECTMENT—

Complaint in, by church trustees, see PLEADING, 9; *Bush v. Bullington*, 587.

ELECTION—

Right of lessor in gas-and-oil lease to determine same, see LANDLORD AND TENANT; *Diamond Plate Glass Co. v. Knot*, 20, 21 (1).

To sue, by vendor retaining title, is election to vest title absolute in vendee, see SALES, 8; *Gaar, Scott & Co. v. Fleshman*, 490, 493 (4), 494 (4).

Doctrine of, applicable to sales where title is held until goods are paid for, see SALES, 4; *Jessup v. Fairbanks, Morse & Co.*, 678, 677 (4).

ELECTIONS—

Towns.—Incorporation.—Objections.—Evidence.—Where no objection is made before the board of commissioners as to the legality of an election and no issue raised thereon on appeal to the circuit court, it is not error to exclude evidence thereof in such circuit court.
Fleener v. Johnson, 334, 339 (6).

ELECTRIC LIGHTS—

As to injuries received by servant in removing wires from poles, see MASTER AND SERVANT, 6-9; *Evansville Gas, etc., Co. v. Raley*, 342.

ELEVATORS—

Negligent operation of, gives right of action to injured party, see NEGLIGENCE, 1; *Rink v. Lowry*, 132, 138 (6).

Complaint for negligence in operation of, see PLEADING, 8; *Rink v. Lowry*, 132, 138 (2).

EMINENT DOMAIN—

See LEVEES.

Cannot take private property without just compensation, by process of, see CONSTITUTIONAL LAW, 1; *Lewis Tp. Improv. Co. v. Royer*, 151, 155 (6).

EQUITY—

See SUBROGATION.

Evidence in cases involving statute of frauds, see EVIDENCE, 8; *Holliday v. Perry*, 588, 599 (13).

Surviving partner's settlement, though statutory, governed by principles of, see PARTNERSHIP, 2; *Harrah v. State, ex rel.*, 495, 501 (1).

ESTOPPEL—

Deed by remarrying widow and part of children does not constitute, see DEEDS, 1; *Pence v. Long*, 63, 75 (12).

Contract contrary to public policy or prohibited by statute, does not estop, see CONTRACTS, 9; *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 240 (5).

Wife estopped from asserting suretyship where money was borrowed for use by partnership of which she was a member, see HUSBAND AND WIFE, 2; *Anderson v. Citizens Nat. Bank*, 190, 193 (2).

Of legal wife from asserting rights in husband's estate, see PLEADING, 1; *Stevens v. Wooderson*, 617, 619 (1).

1. *Deeds.—Warranty.—After-Acquired Title.*—The execution of a valid warranty deed estops the grantor from asserting an after-acquired title. *Pence v. Long*, 63, 76 (13).

2. *Statutes.—Unconstitutional.—Actions Under.*—Defendant is not estopped to assert that a statute is unconstitutional because he has acted under it as though it were valid.

Kingan & Co. v. Orem, 207, 210 (3).

3. *Misrepresentations.—Belief in.—Action Upon.*—Misrepresentations, to be sufficient to create an estoppel, must be believed and acted upon to the plaintiff's injury.

Stevens v. Wooderson, 617, 619 (2).

EVIDENCE—

Sufficiency of, see NEW TRIAL.

Must support allegations, see TRIAL, 39-41.

Acknowledgment of illegitimate child, see DESCENT AND DISTRIBUTION, 1; *Daggy v. Wells*, 27, 28 (1).

Weighing of, on appeal, see APPEAL AND ERROR, 62-67.

To establish lost will, see WILLS, 10; *Inlow v. Hughes*, 375, 390 (2).

Where decision, on appeal, turns upon an indisputable fact, whether other evidence is in the record or not is immaterial,

EVIDENCE—Continued.

- see APPEAL AND ERROR, 18; *Harrah v. State, ex rel.*, 495, 506 (12).
- Incompetent, admitted without objection, will not be cause for reversal, see APPEAL AND ERROR, 42; *Littler v. Robinson*, 104, 108 (2).
- Must show residence for two years preceding filing of petition, in divorce cases, see DIVORCE, 3; *West v. West*, 659, 660 (2).
- In case of attempt to provoke an assault, see ATTEMPTS, 1, 2; *Heard v. State*, 511, 512 (1), (2).
- Sufficiency of, for cancelation of insurance policy, see INSURANCE, 2; *Ohio Farmers Ins. Co. v. Hunter*, 11, 14 (2).
- Not necessary to prove surplus allegations of complaint, see TRIAL, 6; *Hobbs v. Town of Eaton*, 628, 632 (7).
- May be introduced to prove fact admitted by opposite party, see APPEAL AND ERROR, 43; *Board, etc., v. Eaton*, 30, 33 (6).
- How considered in reference to peremptory instruction, see TRIAL, 13; *Hall v. Terre Haute Electric Co.*, 43, 45 (1).
- Official survey, *prima facie* evidence of corners and lines so located, see BOUNDARIES; *Korporal v. Robinson*, 110, 114 (4).
- Doctrine of *res ipsa loquitur* applies to injuries received by passenger on account of car's leaving track, see CARRIERS, 6; *Cincinnati, etc., R. Co. v. Bravard*, 422, 426 (5).
1. *Certificates of Election Officers.—Towns.*—The certificates of the election officers, in an election to determine whether certain territory should be incorporated as a town, are *prima facie* evidence of the number of votes cast for and against such incorporation, but subject to overthrow by objectors' production of the ballots. *Fleener v. Johnson*, 334 337 (3).
 2. *Counties.—Officers.—Reports.—Fees.*—The reports to the board of commissioners of fees collected by a sheriff, which fees are charged on such sheriff's salary account, are admissible in evidence on behalf of such sheriff in an action against such county for the recovery of certain fees therein included. *Board, etc., v. Eaton*, 30, 33 (5).
 3. *Chattel Mortgages.—Indefinite Description.—Identification.*—Parol evidence is admissible to identify the property covered by a chattel mortgage containing an indefinite description of property. *Rudisell v. Jennings*, 403, 413 (8).
 4. *Failure to Produce When Within Party's Control.—Presumptions.*—Where a party fails to produce evidence peculiarly within his control, the presumption is that, if produced, such evidence would be against him. *Western Union Tel. Co. v. McClelland*, 578, 587 (11).
 5. *Exclusion.—Question, How Saved.—Appeal and Error.*—To present any question, on appeal, on the exclusion of evidence, it is necessary for the record to show that a competent witness was sworn; that a proper question was asked; that an objection was made, followed by a statement of facts which the witness would state in response to the question; the court's ruling and the exception. *Fleener v. Johnson*, 334, 338 (4).
 6. *Warranty.—Breach.—Notice.—Waiver.—Receipt.—Question for Jury.*—Where defendant testifies that he properly mailed a notice of defects to plaintiff and plaintiff denies receiving such notice, the question of the receipt of such notice is for the jury. *Siebe v. Heilman Machine Works*, 37, 41 (2).

EVIDENCE—Continued.

7. *Inferences.—Question for Jury.*—It is not necessary to establish a fact that the evidence shall be direct, but inferences may be properly drawn from other proved facts to establish the fact in question, whether such fact is established being primarily a question for the jury.

Siebe v. Heilman Machine Works, 37, 42 (4).

8. *Fraud.—Frauds, Statute of.—Equity.*—Where fraud is involved in an equity case evidence will be admitted which the statute of frauds by its terms would exclude, in order to prevent a misappropriation of property.

Holliday v. Perry, 588, 599 (13).

9. *Judgment.—Collateral Attack.—Execution.—Supplemental Proceedings.*—The original judgment cannot be attacked, in a supplemental proceeding, by evidence tending to show it was erroneous, where no issue is made as to its validity.

Hobbs v. Town of Eaton, 628, 633 (9).

10. *Nuisance.—Fires.—Willingness of Plaintiff to Have House Inspected.*—In a suit to enjoin defendant from operating a foundry which was throwing sparks on plaintiff's house, it was not competent to ask plaintiff whether he would be willing to have an expert examine his flues to see if fires could not originate there.

Over v. Dehne, 427, 436 (9).

11. *Record of Fire Company.—Hearsay.*—The records of a fire company, kept under the regulations of the city fire department, and made by the captain of the company from a memorandum made by another person, the captain not being at the fire, are not competent to prove the origin of the fire so recorded, being inadmissible hearsay.

Over v. Dehne, 427, 436 (10).

12. *Nuisance.—Setting Fires.—Subsequent Fires.*—Evidence of subsequent fires caused by sparks from defendant's foundry admitted as a circumstance tending to show that a similar, prior fire was caused thereby, even if erroneous, was harmless and not reversible error.

Over v. Dehne, 427, 437 (11).

13. *Positive.—Negative.—Weight.*—It cannot be held as a matter of law that the positive evidence of a witness of the happening of a fact is entitled to greater weight than the negative evidence of another witness that he was in a place to know of such fact if it had happened and that such fact did not take place.

New York, etc., R. Co. v. Robbins, 172, 176 (3).

14. *Judicial Notice.—Railroads.—Noise.—Presumptions.*—While the courts judicially know that a moving train makes a noise, the presumption does not exist that such noise is sufficient for an ordinarily prudent person to hear and avoid a collision at a highway crossing.

New York, etc., R. Co. v. Robbins, 172, 179 (4).

15. *Photographs.*—Photographs of a highway crossing when identified are admissible in evidence in a railroad crossing accident case, the point of view from which taken going to their weight as evidence and not to their competency.

New York, etc., R. Co. v. Robbins, 172, 183 (13).

16. *Circumstantial.—Railroads.—Setting Fires.—Negligence of a railroad company in setting fires may be established by circumstantial evidence.*

Baltimore, etc., R. Co. v. O'Brien, 143, 146 (3).

EVIDENCE—Continued.

17. *Railroads.—Setting Fires.—Other Fires.*—Where the court, in an action against a railroad company for negligently setting fires, admitted in evidence, over defendant's objection, the question: "You may state, Mr. Dare, what you observed, if anything, on mornings prior to April 12 at the time of the passage north of this through train," and the answer: "I have observed they were blowing a good many sparks, and they set the grass afire and the shed of the old distillery this side of the cattle pens several times, and I went up there several times and put it out, and it was a precaution in dry weather that we follow the train up morning and evening," and defendant moved unsuccessfully to strike out, because irresponsible, the following part of the answer: "It was a precaution in dry weather that we follow the train up," it was held: Comstock, J., it was reversible error to overrule the motion to strike out such evidence; Roby, C. J., it was not reversible error to overrule the motion to strike out such evidence; Robinson and Wiley, JJ., it was error to admit such evidence; Comstock, Wiley and Myers, JJ., it was error to admit evidence of fires set by different engines at other times and places; Roby, C. J., the evidence admitted was proper for the purpose of showing notice to the defendant of the danger, from sparks, to adjoining property, and being competent for one purpose, was properly admitted.

Cleveland, etc., R. Co. v. Loos, 1.

18. *Parol.—Real Property.*—The location of real property may be proved by parol, and, if there be no objection, title to real property may be so proved. *Little v. Robinson, 104, 108 (3).*
19. *Lost Wills.—Probate.—Post-Testamentary Declarations of Testator.*—The post-testamentary declarations of a testator are admissible, in a suit for the establishment and probate of an alleged lost or destroyed will, to corroborate the testimony of other witnesses testifying to the contents of such lost or destroyed will. *Inlow v. Hughes, 375, 381 (1).*

EXECUTION—

- Appointment of receiver suspends, see **RECEIVERS**; *Hubbard v. Security Trust Co., 156, 158 (1).*
- Sufficiency of evidence to sustain proceedings supplemental to execution, see **NEW TRIAL, 12**; *Hobbs v. Town of Eaton, 628, 632 (8).*
- Sale under, see **OFFICERS, 3**; *Fuller v. Exchange Bank, 570, 573 (4).*
- Complaint in supplemental proceedings, see **PLEADING, 10**; *Hobbs v. Town of Eaton, 628, 631 (3).*
- Original judgment cannot be attacked in supplemental proceedings, by evidence, where no issue was made thereon, see **EVIDENCE, 9**; *Hobbs v. Town of Eaton, 628, 633 (9).*
1. *Lien.—Suspension.*—The taking of the judgment debtor's delivery bond entitles such debtor to the custody of the goods named therein for the time, but does not discharge the lien of such execution. *Hubbard v. Security Trust Co., 156, 159 (6).*
2. *Personal Property.—Liens.*—An execution is a lien upon the judgment debtor's personal property from the time it comes into the proper officer's hands.

Hubbard v. Security Trust Co., 156, 159 (5).

EXECUTION—Continued.

3. *Delivery Bonds.—Principal and Surety.*—The principal upon a delivery bond given to recover possession of property taken upon execution is primarily liable, and his duty is to hold his surety thereon harmless.

Hubbard v. Security Trust Co., 156, 158 (3).

4. *Exemption.—Road Labor.—Statutes.*—No exemption can be claimed by virtue of §715 Burns 1901, §703 R. S. 1881, as against an execution on a judgment for commutation on defendant's failure to work the roads as provided by §6825 Burns 1901, Acts 1883, p. 62, §11.

Hobbs v. Town of Eaton, 628, 631 (4).

5. *Exemptions.—Right of.*—The right of exemption is purely statutory.

Hobbs v. Town of Eaton, 628, 632 (5).

6. *Payment.—Satisfaction.*—The receipt of the money from the execution debtor, or the sale of the debtor's property and receipt of the money therefor, by the sheriff, is a satisfaction of such execution and releases the debtor, regardless of what the sheriff does with the money.

Fuller v. Exchange Bank, 570, 573 (5).

EXECUTORS' AND ADMINISTRATORS—

See DECEDENTS' ESTATES.

EXEMPTIONS—

Right of, statutory, see EXECUTION, 5; *Hobbs v. Town of Eaton*, 628, 632 (5).

From taxation, cemeteries used as such are, see TAXATION, 2; *Oak Hill Cemetery Co. v. Wells*, 479, 482 (3).

None from execution on judgment for failure to work roads, see EXECUTION, 4; *Hobbs v. Town of Eaton*, 628, 631 (4).

FACTORY ACT—

See MASTER AND SERVANT.

Complaint in case of violation of, see PLEADING, 29; *National Fire Proofing Co. v. Roper*, 600, 606 (2).

FEES AND SALARIES—

See OFFICERS.

Evidence in cases of collection of fees, see EVIDENCE, 2; *Board, etc., v. Eaton*, 30, 33 (5).

FENCES—

See RAILROADS.

Whether sufficient to turn stock, question for jury, see APPEAL AND ERROR, 66; *Chicago, etc., R. Co. v. Irons*, 196, 197 (2).

Railroads may be compelled to fence right of way, see CONSTITUTIONAL LAW, 2; *Chicago, etc., R. Co. v. Irons*, 196, 197 (1).

Tenant, protected by covenant to fence, in landlord's deed, see INTERURBAN RAILROADS; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 117 (4).

Itemized cost of, not necessary exhibit to a complaint against railroad company to recover cost of, see PLEADING, 46; *Vandalia R. Co. v. Kanarr*, 146, 147 (1).

FORECLOSURE—

See CHATTEL MORTGAGES; JUDGMENT; LIENS.

Of street improvement liens, see MUNICIPAL CORPORATIONS, 2, 3; *Cleveland, etc., R. Co. v. Porter*, 226, 228 (3), (4).

FORFEITURES—

See INSURANCE; LANDLORD AND TENANT.

FOUNDRY—

See NUISANCE.

FRAUD—

See FRAUDS, STATUTE OF.

Not presumed, see TRIAL, 36; *Harrah v. State, ex rel.*, 495, 505 (10).

Complaint for, see PLEADING, 12, 13.

Of plaintiff as against third parties, no defense to an action, see QUIETING TITLE, 3; *Pence v. Long*, 63, 76, (14).

Refusal to convey real estate may constitute, see TRUSTS, 4; *Holliday v. Perry*, 588, 597 (5).

Deceit.—Conspiracy.—Misrepresentations made to an old, helpless and infirm lady, incapable of attending to her business, by which the conspirators secured possession and legal title to her property, without her consent, constitute actionable fraud.
Lindley v. Kemp, 355, 368 (8).

FRAUDS, STATUTE OF—

Evidence in cases involving, see EVIDENCE, 8; *Holliday v. Perry*, 588, 599 (13).

Use of.—Perpetration of Fraud.—The statute of frauds cannot be used for the perpetration of a fraud.

Holliday v. Perry, 588, 599 (12).

FRAUDULENT CONVEYANCES—

Setting Aside.—Husband and Wife.—Where a wife by fraud secures the legal title to her husband's real estate, the same may be set aside.
Shipley v. Shipley, 48, 52 (2).

GAS-AND-OIL LEASES—

See LANDLORD AND TENANT.

GUARANTY—

Complaint on, see PLEADING, 14; *Kingan & Co. v. Orem*, 207, 210 (4).

HIGHWAYS—

Injuries at railroad crossings, see RAILROADS.

As to signals at crossings of, see NEGLIGENCE, 5-9; *New York, etc., R. Co. v. Robbins*, 172.

No exemption from execution on judgment for road labor, see EXECUTION, 4; *Hobbs v. Town of Eaton*, 628, 631 (4).

HOLIDAYS—

Meaning of, see WORDS AND PHRASES, 1; *State v. Shelton*, 80, 87 (5).

Unlawful to sell liquor on, see STATUTES, 10-12; *State v. Shelton*, 80.

HUSBAND AND WIFE—

See DIVORCE.

As to parol trusts between, see TRUSTS, 1; *Shipley v. Shipley*, 48, 50 (1).

Deed to wife, in fraud of husband, may be set aside, see FRAUDULENT CONVEYANCES; *Shipley v. Shipley*, 48, 52 (2).

Facts necessary to estop wife from asserting interest in husband's estate, see PLEADING, 1; *Stevens v. Wooderson*, 617, 619 (1).

Widow's rights in alienation of husband's land, see DESCENT AND DISTRIBUTION, 2-5; *Pence v. Long*, 63.

Remarrying widow and part of children cannot alienate former husband's land, see DEEDS, 1; *Pence v. Long*, 63, 75 (12).

Imputing husband's negligence to wife, see NEGLIGENCE, 8, 9; *New York, etc., R. Co. v. Robbins*, 172, 183 (11), (12).

Mortgage executed by remarrying widow, on lands of former husband, children of such husband being alive, void, see MORTGAGES, 3; *Polley v. Pogue*, 678, 679 (2).

1. *Disabilities of Wife.—Partnership.*—Section 6960 Burns 1901, §5115 R. S. 1881, abolishing, with certain exceptions, the disabilities of married women, authorizes a wife to engage in partnership with her husband, and money borrowed by such partners for use in such business may be recovered from either. *Anderson v. Citizens Nat. Bank*, 190, 191 (1).

2. *Representations.—Estoppel.*—A married woman, borrowing money on the representation that it was to be used in a partnership business of which partnership she was a member, is estopped under §6962 Burns 1901, §5117 R. S. 1881, from asserting the defense of suretyship.

Anderson v. Citizens Nat. Bank, 190, 193 (2).

3. *Partnership.—Debts of.—Borrowing Money to Pay.—Suretyship.*—Money borrowed by a husband and wife, who constitute a trading partnership, for the payment of an antecedent note due from such partnership, but signed by the husband alone, may be recovered from either, such wife being a principal and not a surety thereon.

Anderson v. Citizens Nat. Bank, 190, 193 (5).

4. *Subsequent, Void Marriage.—Rights of Widows.*—The legal widow takes her statutory rights in all of her deceased husband's property in whose transfer she did not join, though the grantee was ignorant of her marriage to such husband and believed him married to the woman who lived with him and who joined in the execution of the deed.

Stevens v. Wooderson, 617, 620 (4).

ILLEGITIMATE CHILDREN—

As to inheritance by, from father, see DESCENT AND DISTRIBUTION, 1; *Daggy v. Wells*, 27, 28 (1).

INDICTMENT AND INFORMATION—

See CRIMINAL LAW.

1. *Canada Thistles.—Permitting to Grow.—Statutes.*—An affidavit charging that defendant did "knowingly and unlawfully allow Canada thistles to grow and mature, and become of length of more than 6 inches upon his land" states a criminal offense under Acts 1905, pp. 584, 738, §627, §2808 Burns 1905, regardless of the giving of notice as prescribed in §627a of said act. *State v. Dawson*, 483 (1).
2. *Sufficient, Connected with Insufficient, Charge.*—Where an affidavit charges one crime sufficiently, but insufficiently charges another, the affidavit is sufficient, the insufficient charge being treated as surplusage. *State v. Dawson*, 483, 485 (2).
3. *Charging Conjunctively.*—Where the statute makes it a crime to do any one of a number of things mentioned disjunctively, the penalty for all being the same, they may all be charged conjunctively in a single count. *State v. Dawson*, 483, 485 (3).
4. *Second Offense.—Presumptions.*—Where an affidavit fails to show that the crime charged is a second offense, it will be presumed to be a first offense. *State v. Dawson*, 483, 486 (4).
5. *Intoxicating Liquors.—Permitting Music Box to Remain in Saloon.*—An indictment charging that defendant unlawfully permitted a certain device for music, to wit: a Regina music box to be and remain in his saloon, does not state an offense under §7283b Burns 1901, Acts 1895, p. 248, §2, providing that it shall be unlawful to permit any "devices for amusement or music of any kind or character" in a saloon. *Collins v. State*, 625, 627 (2).

INFANTS—

See DESCENT AND DISTRIBUTION; ILLEGITIMATE CHILDREN.

INJUNCTION—

- As to Appellate Court's power to issue on appeal, see APPEAL AND ERROR, 19, 20; *State v. Board, etc.*, 52, 62 (3), (4).
- Lies to prevent city from discharging water upon plaintiff's lot, see MUNICIPAL CORPORATIONS, 7; *Cromer v. City of Logansport*, 661, 668 (3).
- Complaint for, to prevent breach of contract, see PLEADING, 15; *Elwood, etc., Oil Co. v. Glaspy*, 634.
1. *Unfinished Court-House.—Nuisance.—Purpresture.*—A county cannot be compelled by injunction to tear down and remove an unfinished court-house, erected without legal authority, but in good faith, a new court-house being necessary, on the ground that such unfinished court-house constitutes a nuisance or purpresture. *State v. Board, etc.*, 52, 60 (2).
 2. *Life Estate.—Growing Timber.*—Injunction lies on behalf of the life tenant to prevent the reversioner from cutting and removing from the land timber which is necessary for repairs. *Brugh v. Denman*, 486, 488 (4).
 3. *Irreparable Injury.*—Great, as well as irreparable, injury will sustain an injunction for threatened trespass. *Brugh v. Denman*, 486, 489 (5).
 4. *Municipal Corporations.—Nuisance.—Waters.—Decree.—Time Granted to Abate.*—A decree entered in March giving eight months to a city to remedy defects in its street grading and guttering so as to prevent the collection and discharge of water upon plaintiffs' lots, is too lenient. *Cromer v. City of Logansport*, 661, 672 (13).

INSTRUCTIONS—

See TRIAL.

INSURANCE—

Complaint for recovery of, see PLEADING, 16-22.

1. *Return of Policy.—Cancellation.—Intent.*—Whether the return of an insurance policy to the company was an exercise of the right of cancellation depends upon the intent with which it was returned. *Ohio Farmers Ins. Co. v. Hunter*, 11, 13 (1).
2. *Return of Policy.—Cancellation.—Evidence.*—Where assured returned her policy to the company and demanded her premium notes, saying that would settle the matter, the insurance ceased, there being no room for diverse inferences. *Ohio Farmers Ins. Co. v. Hunter*, 11, 14 (2).
3. *Cancellation.—Enforcement of Premium Note.*—Where assured cancels her insurance, the attempted enforcement of the premium notes, so far as they were earned before cancellation, is not inconsistent with such cancellation. *Ohio Farmers Ins. Co. v. Hunter*, 11, 14 (3).
4. *Cancellation.—Assent.*—Where assured is given the right of cancellation in an insurance policy, she may exercise such right regardless of the insurer's assent. *Ohio Farmers Ins. Co. v. Hunter*, 11, 14 (4).
5. *Mutual Benefit.—Certificates.—Promises to Pay Money.*—A mutual benefit certificate granting the holder the right to designate a beneficiary to whom the sum stated, at the holder's death, shall be paid, is a promise to pay money to the beneficiary properly designated. *Grand Lodge, etc., v. Barwe*, 308, 311 (4).
6. *Life.—Extension Tables.—From What Date Calculated.*—The table of extended insurance in a twenty-payment life policy, granting 7 years and 235 days' insurance upon the payment of three premiums, means 7 years and 235 days from the date of the policy and not from the date of lapse, such extension from the date of lapse being unreasonable. *Roby, J., dissenting.* *Union Mut. Life Ins. Co. v. Adler*, 530, 536 (2).
7. *Premiums.—When Payable.*—A twenty-payment life policy providing for the payment of the first premium in advance and for a like amount annually thereafter for twenty years, requires such following annual premiums to be made in advance. *Union Mut. Life Ins. Co. v. Adler*, 530, 537 (3).
8. *Premiums.—Period Covered by Payments of.—Debts.*—The payment of the annual premium on a life policy continues the insurance upon assured's life for such year and gives him the right to continue such payments at the same rate, and such premiums do not constitute a debt. *Roby, J., dissenting.* *Union Mut. Life Ins. Co. v. Adler*, 530, 538 (4).
9. *Life.—Premiums.—Payment.—Bills and Notes.*—The failure of assured to pay his negotiable note, conditioned that if not paid when due the policy, for whose annual premium such note was given, lapses as for nonpayment of premium, does not keep such policy alive as a payment of such premium. *Union Mut. Life Ins. Co. v. Adler*, 530, 539 (7), 540 (7).
10. *Forfeiture.—When Enforced.*—Forfeitures are odious, but will be enforced where there is no reasonable excuse for the default. *Union Mut. Life Ins. Co. v. Adler*, 530, 539 (8).

INSURANCE—Continued.

11. *Premiums.—Notes Given for.—Election.*—The payment of a negotiable note, given for an annual premium on a life policy, and providing that if not paid at maturity such policy lapses as for nonpayment of premium, is optional with the assured and not with the insurer. Roby, J., dissenting.
Union Mut. Life Ins. Co. v. Adler, 530, 540 (9).
12. *Policies.—Construction.*—Provisions in an insurance policy written by the insurer are construed most strictly in favor of the assured. *Home Ins. Co. v. Gagen*, 680, 686 (8).
13. *Policies.—Vacancy.—Void.*—A clause in a lightning policy providing that if the "premises" become vacant, unoccupied or uninhabited, the policy shall be void refers to the farm upon which the insured barn is situated, and not to the barn.
Home Ins. Co. v. Gagen, 680, 686 (9).
14. *Policies.—Vacancy.—Defense.*—A breach of a lightning policy caused by the vacancy of the property insured is a defense which can be asserted only by a special answer.
Home Ins. Co. v. Gagen, 680, 686 (10).

INTERROGATORIES—

See TRIAL.

INTERURBAN RAILROADS—

See DAMAGES.

Complaint against, for killing stock, see PLEADING, 42; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 116 (2).

Deeds.—Covenants.—Breach.—Landlord and Tenant.—Evidence.—The tenant of the grantee of lands bordering on an interurban railroad right of way may maintain an action against such company for wrongfully permitting oil and paint to remain exposed on its rights of way, thereby killing his cow, and support same by evidence of a contract by his landlord's grantor whereby such company agreed to fence such right of way.
Indianapolis, etc., Traction Co. v. Harbaugh, 115, 117 (4).

INTOXICATING LIQUORS—

See STATUTES, 9-16.

Permitting music box to remain in saloon, no offense, see INDICTMENT AND INFORMATION, 5; *Collins v. State*, 625, 627 (2).

JUDGES—

See COURTS.

Duties.—Courts.—Surviving Partners.—Settlements.—It is the duty of the judge of the court to which a surviving partner must report to exercise rigid inspection over such partner's doings and compel a speedy administration of the assets of such partnership. *Harrah v. State, ex rel.*, 495, 506 (14).

JUDGMENT—

What is final, see APPEAL AND ERROR, 27; *Miller v. McKean*, 695.
Complaint for review of, see PLEADING, 24; *Grand Lodge, etc., v. Barwe*, 308, 310 (2).

Decree giving city eight months to abate nuisance, unreasonable, see INJUNCTION, 4; *Cromer v. City of Logansport*, 661, 672 (13).

JUDGMENT—Continued.

Current reports of surviving partners are subject to correction upon final settlement, but not to a collateral attack, see **PARTNERSHIP**, 8; *Harrah v. State, ex rel.*, 495, 503 (7).

Not subject to collateral attack in supplemental proceedings, where no issue involved validity of, see **EVIDENCE**, 9; *Hobbs v. Town of Eaton*, 628, 633 (9).

Resting upon good and bad paragraphs of complaint cannot stand unless it affirmatively appears that it rests on good ones, see **APPEAL AND ERROR**, 33; *Bedford Quarries Co. v. Turner*, 552, 557 (1).

When rule of *stare decisis* cannot be invoked, see **APPEAL AND ERROR**, 29; *Diamond Plate Glass Co. v. Knote*, 20, 26 (3).

Property acquired on faith of a decision of Supreme Court will be protected, see **APPEAL AND ERROR**, 28; *Diamond Plate Glass Co. v. Knote*, 20, 25 (2).

Personal, may not be rendered, in labor lien foreclosure suit, against one not a party to the employment, see **NEW TRIAL**, 8; *Littler v. Robinson*, 104, 109 (6).

Failure to vacate, on granting new trial as of right, not reversible error; but the court on appeal will direct vacation of, see **QUIETING TITLE**, 1; *Richardson v. Stephenson*, 339, 340 (1).

In drainage proceeding, not *res judicata* in a suit to enjoin maintenance of dam in stream not affected by drainage proceeding, see **WATERS AND WATERCOURSES**, 2; *Mindnich v. Kline*, 202.

1. *Without Relief.—Bills and Notes.*—A judgment rendered upon a note containing a provision that it shall be collectible without relief from valuation or appraisal laws should, under §585 Burns 1901, §576 R. S. 1881, provide for the collection thereof without any such relief. *Polley v. Pogue*, 678, 679 (3).

2. *Without Relief.—Evidence.*—An unimpeached stipulation in a note that such note should be collectible without relief entitles the plaintiff to a judgment so collectible. *Polley v. Pogue*, 678, 680 (4).

3. *Special Findings.—Conclusions of Law.—Bills and Notes.—Chattel Mortgages.—Husband and Wife.—Suretyship.*—Where the special findings show that the husband and wife executed their note and a chattel mortgage on certain articles to secure same; that the wife was surety only, and the conclusions of law were against the husband and in favor of the wife, the decree was correct. *Rudisell v. Jennings*, 403, 406 (4).

4. *Motion to Modify.—Chattel Mortgages.—Foreclosure.—Indefinite Description.*—A motion to modify a judgment on a note and for foreclosure of a chattel mortgage by striking out the foreclosure decree should be overruled where the complaint specifically described the mortgaged property, although the mortgage did not, the rights of no innocent parties being involved. *Rudisell v. Jennings*, 403, 408 (6).

5. *Foreclosure.—Mortgagor Not Party.—Effect.*—A decree of foreclosure to which the mortgagor, who was claiming title to the land, was not made a party is a nullity as to him, and does not divest his rights in the land.

Aetna Life Ins. Co. v. Stryker, 312, 329 (12).

JUDGMENT—Continued.

6. *Personal.—Parties.*—A personal judgment against the mortgagor in a foreclosure suit wherein he was not made a party is void. *Aetna Life Ins. Co. v. Stryker*, 312, 329 (13).
7. *Default.—Res Judicata.*—In a judgment by default only those matters properly pleaded in the complaint are *res judicata*. *Pence v. Long*, 63, 72 (1).
8. *Partition.—Remarrying Widow.—Title of Children to Widow's Lands.*—A judgment by default decreeing partition of lands inherited by a remarrying widow and the children of her former marriage merely allots the lands, and such widow takes her share subject to the law of descent casting the inheritance thereof on such children in case of her death during her subsequent marriage. *Pence v. Long*, 63, 75 (11).

JUDICIAL NOTICE—

See EVIDENCE.

JUDICIAL SALES—

Duties of sheriffs in making, see OFFICERS, 2, 3; *Fuller v. Exchange Bank*, 570.

Inadequacy of purchase price must be alleged, when relied on to set aside sale, see PLEADING, 23; *Fuller v. Exchange Bank*, 570, 572 (2).

1. *What Are.*—A judicial sale is one authorized by a competent tribunal and made by an officer authorized by law to make such sale. *Staser v. Gaar, Scott & Co.*, 696, 698 (1).
2. *Partition.—Confirmation by Court.*—A sale made under the order of a court by an officer appointed thereby for the purpose, and which sale becomes effective only upon confirmation by such court is a judicial sale, partition sales being included. *Staser v. Gaar, Scott & Co.*, 696, 698 (2).
3. *Partition.—Conveyances.—Wife Not Joining.—Husband's Creditors.—Wife's Rights.—Statutes.*—Where the wife of one of the tenants in common of certain lands did not join in any conveyance of such lands, she ought to be held to be a proper party in a suit for the partition of such lands and should be entitled under §2669 Burns 1901, §2508 R. S. 1881, to receive the one-third part of the proceeds of the husband's share in preference to her husband's creditors. *Haggerty v. Wagner*, 148 Ind. 625, *contra*. *Staser v. Gaar, Scott & Co.*, 696, 698 (3).
4. *Title Transferred.*—The purchaser at a judicial sale receives only the title owned by the judgment debtor. *Van Buskirk v. Summitville Min. Co.*, 198, 200 (1).
5. *Prior Injuries to Property Sold.—Caveat Emptor.*—The purchaser of property at a judicial sale is not entitled, as purchaser, to damages for injury to the property prior to such sale, the doctrine of *caveat emptor* applying to such purchases. *Van Buskirk v. Summitville Min. Co.*, 198, 200 (2).
6. *Mechanics' Liens.—Lands Purchased under Foreclosure of, Title Relates to What Time.*—Where lands are purchased under a decree foreclosing a mechanic's lien, the title received relates back to the time of the inception of the lien. *Van Buskirk v. Summitville Min. Co.*, 198, 201 (3).

JURISDICTION—

See **COURTS**.

Two years' residence gives, in divorce cases, see **DIVORCE**, 2; *West v. West*, 659, 660 (1).

Appellate Court has none, where appeal was taken under a void statute, see **APPEAL AND ERROR**, 30; *Chicago, etc., R. Co., v. Railroad Com., etc.*, 439, 448 (1).

1. *Action Brought in Wrong County.—How Questioned.—Waiver.*—Where the jurisdiction over the person, because the action was brought in the wrong county, is not questioned by demurrer or answer, such question is waived under §346 Burns 1901, §348 R. S. 1881.

Chicago, etc., R. Co. v. Marshall, 217, 222 (1).

2. *Joint Defendants.—Service.—Venue.*—Two or more defendant corporations having offices in this State may be sued in any county where one of them has an office, service on the others in other counties giving the court jurisdiction.

Chicago, etc., R. Co. v. Marshall, 217, 222 (2).

3. *Joint Defendants.—How Determined.*—Whether defendants in an action are joint is a question to be determined by the court from the complaint on file when the summons is issued, and if it shows a cause of action against the defendants jointly, the court has jurisdiction over all defendants served, where one is a resident of the county in which the action is brought.

Chicago, etc., R. Co. v. Marshall, 217, 222 (3).

4. *Parties.—Appearance.—Filing Demurrer.*—The filing of a demurrer by defendants constitutes a general appearance, and gives the court jurisdiction over the person.

Holliday v. Perry, 588, 594 (1).

JURY—

Questions for, see **NEGLIGENCE**; **TRIAL**.

Where evidence is conflicting, question of fact for jury, see **APPEAL AND ERROR**, 65-67.

Whether notice of defects in machine was received by defendant, question for, see **EVIDENCE**, 6; *Siebe v. Heilman Machine Works*, 37, 41 (2).

Negligence and contributory negligence, usually questions for, see **STREET RAILROADS**, 5, 7, 8; *Union Traction Co. v. Sullivan*, 513.

Where different inferences may be drawn from facts, question for jury, see **TRIAL**, 29; *Stephens v. American Car, etc., Co.*, 414, 419 (3).

LABOR—

"Labor day" is legal holiday as to sales of liquor, see **STATUTES**, 16; *State v. Shelton*, 80, 89 (8).

LABORERS' LIENS—

See **LIENS**.

LANDLORD AND TENANT—

Tenant is protected by covenant, in landlord's deed, requiring railroad company to fence right of way, see **INTERURBAN RAILROADS**; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 117 (4).

LANDLORD AND TENANT—Continued.

Leases.—Gas.—Forfeiture.—Election.—A gas lease by which the lessee is given the right to explore lessor's lands, such lease to terminate whenever "gas ceases to be used generally for manufacturing purposes" or whenever the lessee shall fail to pay the rental price within sixty days after it becomes due, terminates when gas ceases generally to be used for manufacturing purposes, and does not terminate by the mere fact of non-payment, but such fact gives the lessor the right to forfeit such lease. *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, followed. *Diamond Plate Glass Co. v. Knote*, 20, 21 (1).

LEASES—

See **LANDLORD AND TENANT**.

LEVEES—

Complaints in cases of, see **PLEADING**, 25, 26.

Assessment of Damages.—Prospective.—In the assessment of damages on account of the construction of a levee, all damages, present and prospective, should be included. *Lewis Tp. Improv. Co. v. Royer*, 151, 154 (4).

LICENSEES—

See **NEGLIGENCE**.

LIENS—

See **MECHANICS' LIENS**.

Of executions, see **EXECUTION**.

For building fences along railroad right of way, see **RAILROADS**.

Personal judgment not reversible, in labor lien foreclosure suit, where owner did not employ laborer, see **NEW TRIAL**, 8; *Littler v. Robinson*, 104, 109 (6).

For street improvements, see **MUNICIPAL CORPORATIONS**, 2, 3; *Cleveland, etc., R. Co. v. Porter*, 226, 228 (3), (4).

Laborers'.—Foreclosure.—Title.—In order to foreclose a laborer's lien against the owner of lands for work in drilling a gas-and-oil well it is necessary to show that such owner or his agent employed plaintiff to do such work. *Littler v. Robinson*, 104, 109 (5).

LIFE ESTATES—

Life tenant can enjoin cutting of timber necessary for repairs, see **INJUNCTION**, 2; *Brugh v. Denman*, 486, 488 (4).

1. *Growing Timber.—Rights of Life Tenant.*—A life tenant in lands has the right to use the growing timber thereon for use upon the land in making repairs generally. *Brugh v. Denman*, 486, 488 (1).

2. *Waste.*—If the life tenant uses more timber than necessary for making repairs he is guilty of waste, for which a proper action will lie. *Brugh v. Denman*, 486, 488 (2).

LIFE TENANCIES—

See **LIFE ESTATES**.

LIMITATION OF ACTIONS—

State.—Statutes.—By the statute of 1852 (2 R. S. 1852, p. 78, §224) the State was barred in civil cases by the statute of limitations the same as other litigants, but since 1881 (§305 Burns 1901, §304 R. S. 1881) the State is barred only as to sureties. *McCaslin v. State*, 184, 186 (2).

LIS PENDENS—

See VENDOR AND PURCHASER.

MANUFACTORIES—

Cannot be aided by taxation, see MUNICIPAL CORPORATIONS, 4-6; *Collier Shovel, etc., Co. v. City of Washington*, 370.

MASTER AND SERVANT—

See NEGLIGENCE; RAILROADS.

Complaint in cases of, see PLEADING, 27-30.

1. *Assumption of Risk.—Promise to Repair.*—Where the master promised the servant to repair the cogs in a derrick and afterwards assured the servant that such repairs were made, the servant does not assume the risks therefrom, where it is shown that such repairs were not made as promised.

Bedford Quarries Co. v. Turner, 552, 565 (5).

2. *Assumed Risk.—Telegraphs and Telephones.—Removal of Old Poles.—Defects.*—Where a servant, a part of whose duty was the removal of old telegraph poles and the substitution of new ones, depending upon his own inspection and oversight, climbed an old pole, released the wires at the top preparatory to taking it down, and, because of decay under the ground, rendering the supports placed at the foot of the pole by the servant's assistants insufficient, the pole fell injuring the servant, the risk of danger from such defect was assumed though the defect was not known, and could not have been discovered by the use of ordinary care, by such servant.

Adams v. Central Ind. R. Co., 607, 611 (2).

3. *Railroads.—Ways, Works and Machinery.—Steel Punch.—Assumption of Risk.*—A servant, holding a steel punch, used until its head is burred and battered, while his fellow servant strikes it for the purpose of driving out an iron bolt, assumes the risk that small pieces of steel may fly therefrom and injure him, such defect being appreciated and being known by such servant.

Cincinnati, etc., R. Co. v. Phinney, 546.

4. *Assumed Risks.—Liability for.*—The master is not liable for injuries caused by defects, the risks of which are assumed.

Evansville Gas, etc., Co. v. Raley, 342, 344 (1).

5. *Assumed Risks.—Defects Open to Observation.*—The master, in the absence of a promise to repair, is not liable for patent defects.

Evansville Gas, etc., Co. v. Raley, 342, 346 (2).

6. *Electricity.—Light Poles.—Latent Defects.—Superior Position to Inspect.*—The servant employed to remove wires from an electric light pole is, as a matter of law, in a superior position to that of the master to detect latent defects in such wire and pole, and therefore assumes such risks. Roby, J., dissenting.

Evansville Gas, etc., Co. v. Raley, 342, 347 (3).

MASTER AND SERVANT—Continued.

7. *Electricity.—Light Poles.—Duty to Inspect.*—Where a servant is employed to take down and put up electric light wires, such work being necessarily dangerous, the master is under no duty to inspect the electric light poles and wires to discover latent defects. Roby, J., dissenting.

Evansville Gas, etc., Co. v. Raley, 342, 347 (4).

Electricity.—Light Poles.—Safe Place.—A servant employed to remove wires from an electric light pole has no right to rely upon an implied representation that such pole is free from latent defects. Roby, J., dissenting.

Evansville Gas, etc., Co. v. Raley, 342, 349 (6).

9. *Electric Light Poles.—Accidents.—Maxims.*—Where an electric light lineman, according to orders, climbed a pole to remove a wire, and in doing so stuck his spur into the pole, and, by reason of a latent defect not observable by him, his spur hold broke out causing him to fall, his hand catching a wire from which the insulation had decayed, thus forming a short circuit and burning three fingers off of one hand and two off of the other, such injury is the result of an accident, and is *damnum absque injuria*. Roby, J., dissenting.

Evansville Gas, etc., Co. v. Raley, 342, 349 (7).

10. *Negligence.—Contributory.—Factory Act.—Dangerous Machinery.—Failure to Guard.*—Where the servant attempted to adjust an unguarded dangerous machine, operated by him in defendant's factory, without stopping the same, the question of contributory negligence is properly submitted to the jury.

Stephens v. American Car, etc., Co., 414, 418 (2).

11. *Factory Act.—Dangerous Machinery.*—An unguarded hole in a floor with rollers and knives beneath so arranged as to cut and grind clay and other materials dumped therein by the servants in the manufacture of tiling is not an appliance or machine within the meaning of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) providing that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description" shall be properly guarded.

National Fire Proofing Co. v. Roper, 600, 604 (1).

12. *Servant's Agreeing to Cease Work Until Plaintiff Makes Repairs.*—The operator of defendant's elevator, who agrees with plaintiff to cease running such elevator until plaintiff has completed certain repairs in the shaft thereof, is defendant's servant during such time, and not plaintiff's.

Rink v. Lowry, 132, 140 (8).

13. *Safe Place.—Promise to Repair.*—Where the master promised to repair the defective cogs in a derrick used in moving heavy stones at a quarry, and the servant, thinking and being assured by the master that such repairs were made, took his position and because of the nonrepair of such cogs, a large stone fell, causing one of plaintiff's feet to be caught and crushed, the master is liable.

Bedford Quarries Co. v. Turner, 552, 563 (4).

MASTER COMMISSIONER—

As to practice before, see **APPEAL AND ERROR**, 45, 46; *Harrah v. State, ex rel., 495.*

MAXIMS—

See WORDS AND PHRASES.

"So use your property as not to injure another," applicable to railroad companies, see RAILROADS, 11; *Chicago, etc., R. Co. v. Fox*, 268, 276 (3).

Volenti non fit injuria: No injury is done to a consenting person; *Cincinnati, etc., R. Co. v. Phinney*, 546, 552.

Damnum absque injuria: A loss without a cause of action; see MASTER AND SERVANT, 9; *Evansville Gas, etc., Co. v. Raley*, 342.

Expressio unius est exclusio alterius: The express mention of one thing implies the exclusion of another; *Collins Coal Co. v. Hadley*, 637, 644.

MECHANICS' LIENS—

Complaint to foreclose, see PLEADING, 31; *Siegmund v. Kellogg-Mackay-Cameron Co.*, 95, 98 (4).

To what time sale under foreclosure of, relates, see JUDICIAL SALES, 6; *VanBuskirk v. Summitville Min. Co.*, 198, 201 (3).

1. *Notice.—Signature.*—A notice of a lien for materials furnished in the erection of a house, signed in the name of the lienor by his attorney, is sufficient.

Siegmund v. Kellogg-Mackay-Cameron Co., 95, 97 (1).

2. *Notice.—Contents.*—It is not necessary in a notice for a lien for materials furnished in the construction of a house to state more than that such lien is claimed for materials furnished in the construction of such house.

Siegmund v. Kellogg-Mackay-Cameron Co., 95, 97 (2).

3. *Heating Plant.—Completed Building.*—A lien may be enforced for the furnishing of materials for the installation of a heating plant in a hotel building.

Siegmund v. Kellogg-Mackay-Cameron Co., 95, 97 (3).

4. *Additional Materials.*—A material man furnishing materials for the installation of a heating plant is entitled to a lien for all materials furnished, though notice of such lien was filed after sixty days from the completion of the original contract, where additional material was furnished for the completion of the entire improvement within sixty days prior to such notice.

Siegmund v. Kellogg-Mackay-Cameron Co., 95, 100 (6).

MINES AND MINERALS—

Right of action for death of coal miner accrues to widow and children and not to personal representative, see ACTION; *Collins Coal Co. v. Hadley*, 637, 642 (2).

Complaint for death in coal mine, see PLEADING, 30; *Collins Coal Co. v. Hadley*, 637, 642 (1).

General law giving administrator right to sue for death of decedent did not repeal special statute giving widow and children of coal miner right to sue, see STATUTES, 4; *Collins Coal Co. v. Hadley*, 637, 645 (5), 652 (5).

MISREPRESENTATIONS—

See ESTOPPEL.

MONOPOLIES—

Contracts creating, void, see **CONTRACTS**, 6; *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 238 (2).

Validity.—The policy of the law is to prevent the creation of monopolies and to foster fair competition.

Chicago, etc., R. Co. v. Southern Ind. R. Co., 234, 238 (1).

MORTGAGES—

See **CHATTEL MORTGAGES**.

Complaint for foreclosure and accounting, see **PLEADING**, 34; *Aetna Life Ins. Co. v. Stryker*, 312, 328 (11).

1. **Foreclosure.—Redemption.**—A mortgagor, not made a party to a foreclosure, may redeem from such foreclosure after the execution of the sheriff's deed, though he knew of such foreclosure before the execution of such deed.

Aetna Life Ins. Co. v. Stryker, 312, 332 (17).

2. **Suit for Redemption. — Taxes. — Rents. — Improvements. — Right to an Accounting.**—A redemptioner has the right in his suit to redeem to have an accounting taken of the taxes, rents and improvements.

Aetna Life Ins. Co. v. Stryker, 312, 333 (18).

3. **Validity.—Widow Remarrying.—Descent and Distribution.**—A mortgage executed by a married woman, who inherited the lands mortgaged from a former husband by whom she had children living, is void under §2641 Burns 1901, §2484 R. S. 1881.

Polley v. Pogue, 678, 679 (2).

MOTIONS—

See **PLEADING**.

To strike out, should specify portions to be eliminated, see **APPEAL AND ERROR**, 47; *Lindley v. Kemp*, 355, 357 (1).

For *venire de novo*, proper remedy for defective verdict, see **NEW TRIAL**, 1; *McCaslin v. State*, 184, 189 (7).

To paragraph, proper remedy for duplicity, see **PLEADING**, 69; *Western Union Tel. Co. v. McClelland*, 578, 583 (3).

To make more specific, proper remedy for obscurity, see **PLEADING**, 67; *Lewis Tp. Improv. Co. v. Royer*, 151, 154 (3).

For a *venire de novo*, made after final judgment, too late, see **TRIAL**, 42; *McCaslin v. State*, 184, 188 (5).

MUNICIPAL CORPORATIONS—

See **DAMAGES**.

As to proceedings for incorporation of town, see **ELECTIONS**; *Fleener v. Johnson*, 334, 339 (6).

Cannot be given an unnecessary length of time to make repairs to street, see **INJUNCTION**, 4; *Cromer v. City of Logansport*, 661, 672 (13).

Certificates of election officers at town election, *prima facie* evidence of votes cast, see **EVIDENCE**, 1; *Fleener v. Johnson*, 334, 337 (3).

MUNICIPAL CORPORATIONS—Continued.

May not aid private enterprises, see **CONTRACTS**, 4; *Collier Shovel, etc., Co. v. City of Washington*, 370, 374 (3).

Complaint for damages, caused by defective streets, see **PLEADING**, 35, 36; *City of Indianapolis v. Mullally*, 125.

As to special findings in case of collection and discharge of waters on plaintiffs' lot, see **TRIAL**, 34, 35; *Cromer v. City of Logansport*, 661.

Instructions as to injuries by reason of defective streets, see **TRIAL**, 18-20; *City of Indianapolis v. Mullally*, 125.

1. **Defective Streets.—Notice.—Care Required.—Question for Jury.**—Notice of a defect in a street does not preclude recovery for injuries caused thereby but casts upon plaintiff the duty to use care commensurate with the known danger, and whether he does use such care is a question for the jury.

City of Indianapolis v. Mullally, 125, 131 (8).

2. **Street Improvement Liens.—Subsequent Foreclosure on Back-Lying Lots.**—The holder of a lien for street improvements, having foreclosed same as against the lots fronting the street, may subsequently foreclose such lien against the back-lying lots. *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, followed. *Cleveland, etc., R. Co. v. Porter*, 226, 228 (3).

3. **Street Improvement Liens.—Subsequent Foreclosure on Back-Lying Lots.—Attorneys' Fees.**—In a suit to foreclose the lien for street improvements against back-lying lots, such lien having been foreclosed against the lots fronting the street, attorneys' fees may be recovered, though attorneys' fees were recovered in the former foreclosure. *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, followed.

Cleveland, etc., R. Co. v. Porter, 226, 228 (4).

4. **Taxation.—Aids to Manufactories.**—Municipal corporations have no power to levy taxes and use same for aiding manufactories.

Collier Shovel, etc., Co. v. City of Washington, 370, 373 (2).

5. **Taxes.—Use of.—Public Policy.**—The public policy requiring contracts by municipal corporations to grant bonuses to private industries to be held void lies in the protection of such corporations' funds, and the courts will not enforce bonds for the performance of such contracts when to do so would endanger such funds.

Collier Shovel, etc., Co. v. City of Washington, 370, 375 (5).

6. **Bonuses to Private Enterprises.—Recovery of.—Contracts.**—While a municipal corporation cannot enforce a bond for the return of money given to a private company as a bonus for the establishment of a private enterprise, it may recover money thus unlawfully paid out.

Collier Shovel, etc., Co. v. City of Washington, 370, 375 (6).

7. **Waters and Watercourses.—Collection and Discharge.—Damage.—Injunction.**—A municipal corporation is liable in damages for, and may be enjoined from, the collection of surface-waters and the discharge of same upon plaintiffs' lots to their damage. *Cromer v. City of Logansport*, 661, 668 (3).

MUTUAL BENEFIT SOCIETIES—

See **INSURANCE**.

NEGLIGENCE—

See CARRIERS; MASTER AND SERVANT; PLEADING; RAILROADS; STREET RAILROADS.

In failing to send message, see TELEGRAPHS AND TELEPHONES.

Question of, for jury, see APPEAL AND ERROR, 67; *Indianapolis Traction, etc., Co. v. Smith*, 160, 166 (5).

Plaintiff cannot aggravate injuries and recover increased damages, see DAMAGES, 3; *Cromer v. City of Logansport*, 661, 669 (6).

Several acts alleged, proof of one sufficient, see PLEADING, 28; *Bedford Quarries Co. v. Turner*, 552, 563 (2).

Answer showing that but for defendant's negligent act, plaintiff would not have been injured, shows such act to be the proximate cause of the injury, see TRIAL, 33; *Bedford Quarries Co. v. Turner*, 552, 563 (3).

1. *Elevators.—Operation.*—Where plaintiff was solicited by defendant to repair the telephone batteries situated in an elevator shaft, and, upon the agreement of defendant's elevator operator not to run such elevator, plaintiff began work in such shaft, and while at work such elevator operator started such elevator, thus injuring plaintiff, defendant is liable.

Rink v. Lowry, 132, 138 (6).

2. *Licensees.—Evidence.—Inferences.*—An employe of a telephone company in making repairs to defendant's telephone at defendant's request is not a mere licensee, and such request may be inferred from other facts proved.

Rink v. Lowry, 132, 140 (7).

3. *Contributory.—Upon What Depends.*—Negligence and contributory negligence depend largely upon the facts of each case, all of the circumstances being taken into account.

Rink v. Lowry, 132, 141 (9).

4. *Contributory.—Elevators.—Question for Jury.*—Where there was evidence that plaintiff was injured because defendant's servant started defendant's elevator in violation of his agreement with plaintiff not to do so while plaintiff was engaged in making repairs, the questions of negligence and contributory negligence are for the jury.

Rink v. Lowry, 132, 141 (10).

5. *Contributory.—Railroads.—Highway Crossings.*—Whether a wife riding in a wagon with her husband who was driving was guilty of contributory negligence in crossing a railroad after dark when she could have seen an approaching train only a portion of the time and might or might not have heard it by stopping and listening, is a question for the jury.

New York, etc., R. Co. v. Robbins, 172, 180 (5).

6. *Contributory.—Railroads.—Signals.—Care Required by Traveler.—Question for Jury.*—It is the duty of the traveler, on approaching a railroad crossing, to watch in both directions for passing trains, and the failure of such company to sound its whistle should, with all other facts, be taken into consideration by the jury in determining the question of contributory negligence.

New York, etc., R. Co. v. Robbins, 172, 180 (6).

7. *Contributory.—Burden of Proof.—Evidence.*—The burden of proving contributory negligence is upon the defendant, but the whole evidence should be considered on such question.

New York, etc., R. Co. v. Robbins, 172, 182 (10).

NEGLIGENCE—Continued.

8. *Contributory.—Imputing Husband's to Wife.*—Where a wife was riding in a wagon driven by her husband, the fact that she was the wife is not alone sufficient to impute his negligence to her and thus preclude her administrator from a recovery for her death caused by the negligence of the railroad company. *New York, etc., R. Co. v. Robbins*, 172, 183 (11).
9. *Contributory.—Imputing.—Railroads.—Highway Crossings.*—A wife riding with her husband who controls the wagon is not thereby relieved from the exercise of ordinary care for her own safety in crossing a railroad. *New York, etc., R. Co. v. Robbins*, 172, 183 (12).
10. *Contributory.—Mitigation.—Defense.*—Contributory negligence, when a proximate cause in an action for negligence, bars any recovery whatever; but where it only contributes to the aggravation of injuries after they are suffered, it becomes a matter in mitigation of damages only. *Cromer v. City of Logansport*, 661, 669 (5).

NEW TRIAL—**See TRIAL.**

As of right, mandatory in quieting title cases, see **QUIETING TITLE**, 1; *Richardson v. Stephenson*, 339, 340 (1).

Will be awarded by Appellate Court where plaintiff might lawfully recover, though answers to interrogatories technically entitle defendant to judgment, see **APPEAL AND ERROR**, 50; *New Castle Bridge Co. v. Steele*, 194, 195 (2).

Motion for, filed June 29, was too late where decree was entered April 28, and term closed April 30, see **APPEAL AND ERROR**, 49; *Richardson v. Stephenson*, 339, 341 (5).

Causes for, cannot be assigned independently on appeal, see **APPEAL AND ERROR**, 48; *Over v. Dehne*, 427, 431 (3); *Hobbs v. Town of Eaton*, 628, 634 (11).

1. *Defective Verdict.—Venire de novo.*—A new trial cannot be demanded because of a defective verdict, a motion for a *venire de novo* being the proper remedy.

McCaslin v. State, 184, 189 (7).

2. *Amount of Recovery.—Whether a Question of Law or Fact.—Appeal and Error.*—Where the evidence is conflicting as to the amount of recovery, the amount due is a question for the jury, and its verdict is conclusive on appeal; but where there is no dispute as to the facts, the question is for the court, whose decision may be reviewed on appeal.

Kingan & Co. v. Orem, 207, 209 (1).

3. *Recovery too Small.—Insufficient Complaint.*—A new trial will not be granted because the amount of recovery is too small where the complaint is fatally defective.

Kingan & Co. v. Orem, 207, 211 (5).

4. *Reasons.—Statutes.*—Reasons for a new trial not prescribed by the code (§568 Burns 1901, §559 R. S. 1881) will not be considered. *Over v. Dehne*, 427, 431 (4).

5. *Decision Contrary to Law.—Evidence.—Fraud.*—A decision treating orders of a court having jurisdiction of the persons and subject-matter as a nullity is contrary to law, where there was no allegation nor proof of fraud.

Harrah v. State, ex rel., 495, 506 (13).

NEW TRIAL—Continued.

6. *Contrary to Law.—Insufficient Evidence.—Failure to Find Proven Facts.*—A failure to find material proven facts renders the decision pronounced upon the special findings contrary to law; and a new trial will be granted therefor as well as upon the ground of the insufficiency of the evidence.
Polley v. Pogue, 678, 680 (5).
7. *Failure to Appoint Stenographer.*—The failure of the court to appoint an official stenographer to report the evidence in a cause is not a ground for a new trial where no request therefor was made.
Rudisell v. Jennings, 403, 407 (5).
8. *Foreclosure of Laborers' Liens.—Personal Judgment.*—In a suit to foreclose a laborer's lien it is erroneous to render a personal judgment against the owner of land where such owner did not employ plaintiff to do the work sued for.
Little v. Robinson, 104, 109 (6).
9. *Evidence. — Sufficiency. — Railroads. — Fences. — Attorneys' Fees.*—Evidence showing that defendant railroad company refused to build a fence along its right of way; that plaintiff, after giving notice, built such fence; that defendant failed to pay therefor; that plaintiff brought suit; that his complaint was signed by his attorney; that such attorney represented plaintiff in all the proceedings in court and that a reasonable attorney's fee was a certain amount, sustains a finding for plaintiff for attorney's fees.
Terre Haute, etc., R. Co. v. Salisbury, 100, 103 (2).
10. *Insufficient Evidence.—Title.*—Evidence showing that defendant owned a farm about two miles north of a certain place; that it was the only farm he owned; that he leased a part of his lands for oil and gas purposes, and that the transfer records showed that he owned lands in the section claimed, sustains a finding that defendant owned a part of the southeast quarter of section twenty-eight, township twenty-three north, range nine east.
Little v. Robinson, 104, 108 (4).
11. *Nuisance.—Setting Fires.—Evidence.*—Evidence that sparks frequently fell from defendant's foundry on plaintiff's house, that several fires broke out on plaintiff's roof, always when the foundry was running, and that defendant frequently sprinkled plaintiff's roof before starting the foundry fire, sufficiently sustains a finding that the fires to plaintiff's house, complained of, started from such foundry.
Over v. Dehne, 427, 434 (6).
12. *Evidence.—Supplemental Proceedings.*—The transcript of a justice's docket showing a judgment against defendant for commutation for failure to work the roads, together with evidence that such judgment is in force and uncollectible by execution, sustains a judgment in supplemental proceedings against defendant's debtor and in denial of defendant's alleged exemption.
Hobbs v. Town of Eaton, 628, 632 (8).
13. *Evidence.—Railroads.—Setting Fires.*—Where the evidence shows that defendant railroad company permitted dry grass to accumulate on its right of way; that twenty minutes after its train passed smoke was seen along the track; that grass was burnt on such way and the adjoining owners' woods were burning, a verdict for such owner is sustained by the evidence.
Baltimore, etc., R. Co. v. O'Brien, 143, 146 (4).

NOTES—

See **BILLS AND NOTES.**

NOTICE—

Of appeal, when necessary, see **APPEAL AND ERROR**, 1; *Nemitz v. State, ex rel.*, 509 (1).

To build or repair fences, see **RAILROADS**.

Of injury, necessary to charge plaintiff with duty to avoid increasing damages, see **DAMAGES**, 6; *Cromer v. City of Logansport*, 661, 670 (9).

Quitclaim deed is notice of defective title, see **DEEDS**, 3, 5; *Korporal v. Robinson*, 110, 113 (3); *Aetna Life Ins. Co. v. Stryker*, 312, 331 (15).

Of defect in street, not conclusive of contributory negligence of person injured thereby, see **MUNICIPAL CORPORATIONS**, 1; *City of Indianapolis v. Mullally*, 125, 131 (8).

Sufficiency of mechanic's lien notice, as to contents and signature, see **MECHANICS' LIENS**, 1, 2; *Siegmund v. Kellogg-Mackay-Cameron Co.*, 95, 97 (1), (2).

May be waived, as to defects in machinery, see **SALES**, 9; *Siebe v. Heilman Machine Works*, 37, 41 (3).

On *lis pendens* record, sufficient, see **VENDOR AND PURCHASER**, 1; *Aetna Life Ins. Co. v. Stryker*, 312, 321 (3), 328 (3).

NUISANCE—

Unfinished court-house not a, see **INJUNCTION**, 1; *State v. Board, etc.*, 52, 60 (2).

Eight months, too long a time in which city may have to abate, see **INJUNCTION**, 4; *Cromer v. City of Logansport*, 661, 672 (13).

Evidence in case where foundry threw out sparks upon plaintiff's house, see **EVIDENCE**, 10-12; *Over v. Dehne*, 427.

Sufficiency of evidence to show a nuisance by setting fires, see **NEW TRIAL**, 11; *Over v. Dehne*, 427, 434 (6).

Foundry.—Prescription.—The operation of a foundry for more than twenty years at the same location does not give its owner a prescriptive right to continue its operation, where, prior to two years preceding the suit, it had not been dangerous to plaintiff's property, but since such time it had set his house on fire several times, destroyed the usefulness of his cistern and caused his house to be uncomfortable and in imminent danger all of the time. *Over v. Dehne*, 427, 431 (5), 438 (5).

NUNC PRO TUNC ENTRIES—

See **TRIAL**, 1.

OFFICERS—

Reports of fees collected admissible to show certain fees collected by officer, see **EVIDENCE**, 2; *Board, etc., v. Eaton*, 30, 33 (5).

1. *Sheriffs.—Fees and Salaries.—Court Attendance.*—The per diem allowances to sheriffs, paid to the county as a part of the "fees" of the office, may be recovered by such sheriffs. *Board, etc., v. Crone*, 36 Ind. App. 283, followed.

Board, etc., v. Eaton, 30, 32 (1).

2. *Sheriffs.—Judicial Sales.—Payment.—Title.*—A sheriff, being a public officer whose powers are specially prescribed by statute, cannot pass title to property sold by him on execution, unless payment therefor is made to him in money.

Fuller v. Exchange Bank, 570, 572 (3).

OFFICERS—Continued.

3. *Sheriffs.—Judicial Sales.—Purchase by Execution Creditor.—Payment.*—A receipt by the execution creditor for the purchase price of the execution debtor's property, sold on execution by the sheriff, is a payment in money within the meaning of the law.
Fuller v. Exchange Bank, 570, 573 (4).

OIL-AND-GAS LEASES—

See LANDLORD AND TENANT.

OVERRULED CASES—

See CASES.

PARTIES—

- Death of, effect on appeal, see APPEAL AND ERROR, 52.
 An estate, as such, not proper, see APPEAL AND ERROR, 51; *Pierce v. Bronnenberg*, 655, 656 (1).
 Administrator not proper party in action for death of coal miner, see ACTION; *Collins Coal Co. v. Hadley*, 637, 642 (2).
 Administrator of deceased partner's estate, proper relator on surviving partner's bond, see PARTNERSHIP, 5; *Harrah v. State, ex rel.*, 495, 502 (4).
 Children of former marriage are proper, in suit for partition by remarried widow, see PARTITION, 1; *Pence v. Long*, 63, 74 (7).
 Jurisdiction over, in wrong county, waiver of defect in, see JURISDICTION, 1; *Chicago, etc., R. Co. v. Marshall*, 217, 222 (1).
 Whether wife of tenant in common, who did not join in deed, is proper, in subsequent partition suit, see JUDICIAL SALES, 3; *Staser v. Gaar, Scott & Co.*, 696 698 (3).
 Mortgagor, not a party, not bound by decree of foreclosure, see JUDGMENT, 5, 6; *Aetna Life Ins. Co. v. Stryker*, 312, 329 (12), (13).
 Widow and children of employe killed in coal mine, proper parties to maintain action, see STATUTES, 4; *Collins Coal Co. v. Hadley*, 637, 645 (5), 652 (5).

PARTITION—

- Sales in, where wife of a tenant in common did not join in deed, see JUDICIAL SALES, 3; *Staser v. Gaar, Scott & Co.*, 696, 698 (3).
 Effect of, as to title of remarried widow in lands of former husband, see JUDGMENT, 8; *Pence v. Long*, 63, 75 (11).
 1. *Parties.—Remarrying Widow.—Children of Former Marriage.*—The children of the former marriage are proper parties in a suit for partition by the remarried widow.
Pence v. Long, 63, 74 (7).
 2. *Quieting Title.*—Title is not adjudicated in the ordinary suit for partition, though the nature of the titles of the parties be set out.
Pence v. Long, 63, 74 (8).
 3. *Quieting Title.—How Question Presented.—Pleading.*—In a suit for partition by a remarried widow against the children of the former marriage, the complaint merely showing the portions respectively inherited by the parties and failing to show that the children were making any claims to her portion, a judgment by default is not *res judicata* as to the rights of such children to such widow's portion at her death.
Pence v. Long, 63, 74 (9).

PARTNERSHIP—

Complaint on surviving partner's bond, see PLEADING, 37; *Harrah v. State, ex rel.*, 495, 503 (8).

Duty of judge to supervise accounting of surviving partner, see JUDGES; *Harrah v. State, ex rel.*, 495, 506 (14).

One cotenant's contract to give another cotenant part of the net profits as rent does not constitute, see ACCOUNT; *Bond v. May*, 396, 399 (2).

Husband and wife may be partners, see HUSBAND AND WIFE, 1; *Anderson v. Citizens Nat. Bank*, 190, 191 (1).

Where surviving partner's current reports are not shown to be fraudulent, they are taken as correct, see TRIAL, 36; *Harrah v. State, ex rel.*, 495, 505 (10).

1. *Accounting.—Recovery by Partner Without.*—One partner cannot recover from another any sum that may be due on account of partnership matters without an accounting.

Bond v. May, 396, 398 (1).

2. *Surviving Partners.—Settlement.—Statutes.—Equity.*—While the probate courts in the settlement of estates and in proceedings for the settlement of partnerships by the surviving partners apply equitable doctrines, still, the procedure is statutory. §§8122-8129 Burns 1901, §§6046-6053 R. S. 1881.

Harrah v. State, ex rel., 495, 501 (1).

3. *Surviving Partners.—Failure to do Duty.—Receivers.*—Under §§8126, 8127 Burns 1901, §§6050, 6051 R. S. 1881, where the surviving partner fails properly to discharge the duties of his trust a receiver may be appointed on behalf of any person interested.

Harrah v. State, ex rel., 495, 502 (2).

4. *Surviving Partners.—Settlements.*—The surviving partner stands in the same relation to the partnership property as the administrator or trustee to his trust estate, being governed by similar statutory provisions.

Harrah v. State, ex rel., 495, 502 (3).

5. *Surviving Partners.—Bonds.—Administrator of Deceased Partner's Estate Proper Relator.*—The administrator of the deceased partner's estate is a proper relator in an action on the surviving partner's bond, but the assets recovered cannot be distributed to such estate until the partnership's debts are all paid.

Harrah v. State, ex rel., 495, 502 (4).

6. *Surviving Partners.—Bonds.—Action on.—Exclusion of Probate Court.*—The circuit court in an action on the bond of a surviving partner cannot exclude the probate court from jurisdiction in the settlement of the partnership.

Harrah v. State, ex rel., 495, 503 (5).

7. *Surviving Partners.—Bonds.—Actions on.—Final Settlement.—Setting Aside.*—An action will not lie on the bond of a surviving partner until his final settlement is set aside, if one has been made.

Harrah v. State, ex rel., 495, 503 (6).

8. *Surviving Partners.—Current Reports.—Collateral Attack.—Evidence.*—Current reports of a surviving partner are not *res judicata* but are not subject to a collateral attack, and upon exceptions to a final report are only *prima facie* evidence of the truth of their contents. *Harrah v. State, ex rel.*, 495, 503 (7).

PASSENGERS—

See CARRIERS.

PAYMENT—

Presumption that negotiable note is, see **BILLS AND NOTES**, 1; *Union Mut. Life Ins. Co. v. Adler*, 530, 539 (6).

To sheriff, satisfies execution, regardless of what sheriff does with money, see **EXECUTION**, 6; *Fuller v. Exchange Bank*, 570, 573 (5).

PENALTIES—

Recoverable for failure to send message, see **TELEGRAPHS AND TELEPHONES**.

Statutes creating, strictly construed, see **STATUTES**, 2; *Western Union Tel. Co. v. McClelland*, 578, 585 (6).

PHOTOGRAPHS—

Admissible in evidence, see **EVIDENCE**, 15; *New York, etc., R. Co. v. Robbins*, 172, 183 (13).

PLEADING—

See **AMENDMENTS**; **NEW TRIAL**; **TRIAL**.

Complaint attacked for first time on appeal, see **APPEAL AND ERROR**, 31, 32.

Filing of a demurrer constitutes an appearance, see **JURISDICTION**, 4; *Holliday v. Perry*, 588, 594 (1).

Who are joint defendants, how determined, see **JURISDICTION**, 3; *Chicago, etc., R. Co. v. Marshall*, 217, 222 (3).

Theory of complaint may be determined, on appeal, from record and briefs, see **APPEAL AND ERROR**, 39.

Demurrer to complaint raises no question where amended complaint is on file, see **APPEAL AND ERROR**, 37; *Richardson v. Stephenson*, 339, 341 (3).

Sustaining demurrer to paragraph of answer is harmless where facts were provable under another paragraph, see **APPEAL AND ERROR**, 36; *Richardson v. Stephenson*, 339, 341 (4).

Not necessary to prove surplus allegations of, see **TRIAL**, 6; *Hobbs v. Town of Eaton*, 628, 632 (7).

Proof must support allegations, see **TRIAL**, 39-41.

1. *Answer. — Estoppel. — Husband and Wife.* — An answer, to estop an undivorced wife from asserting her rights in land afterwards sold by her husband, an alleged subsequent wife executing the deed with him, is bad, where it fails to show that plaintiff knew that the husband owned the land, was trying to sell it, or that the purchaser relied upon or was induced to buy it by reason of anything plaintiff did.

Stevens v. Wooderson, 617, 619 (1).

2. *Judgment. — Res Judicata. — Matters Concluded.* — In determining the matters concluded in a judgment pleaded in answer, the court will look to the issuable facts pleaded in such former case and not to the conclusions set forth in such answer.

Pence v. Long, 63, 73 (4).

PLEADING—Continued.

3. *Argumentative Denial.*—It is not error to hold an argumentative denial good, although its facts are provable under another paragraph of answer.

People's State Bank v. Ruxer, 420, 421 (1).

4. *Complaint.—Amendment.—Refusal.—Harmless Error.*—It is harmless error to refuse an amendment to a paragraph of complaint where the relief sought by the amendment was granted under another paragraph.

Cromer v. City of Logansport, 661, 668 (2).

5. *Complaint.—Amendable Defects.—Statutes.—Appeal and Error.*—Where a complaint contains defects which might have been amended below, it will be held sufficient under §670 Burns 1901, §658 R. S. 1881.

Richardson v. Stephenson, 339, 341 (2).

6. *Complaint.—Contracts.—Written.—Oral Modifications.—Sales of Lands.—Vendor and Purchaser.*—A complaint showing a written contract by which defendant and plaintiffs agreed to purchase coal lands under certain conditions; that plaintiffs afterward orally agreed that defendant should advance their share of the money and take the legal title to the land and hold as security until payment; that plaintiffs offered to repay said sum but defendant refused to accept or to convey their interest, counts upon a contract in writing for the purchase of such land, the oral agreement as to payment being collateral.

Holliday v. Perry, 588, 597 (6).

7. *Complaint.—Contracts.—Performance.—General Allegations.—Special.*—A complaint counting upon a written contract and failing to allege generally the performance by the plaintiff, as provided by §373 Burns 1901, §370 R. S. 1881, must allege with certainty to a common intent the facts showing performance.

Home Ins. Co. v. Gagen, 680, 684 (1).

8. *Complaint.—Negligence.—Elevators.*—A complaint showing that the plaintiff, an employe of a telephone company, was requested by defendant to repair his telephone; that while engaged in such work defendant negligently set in motion the elevator, thereby injuring plaintiff, is sufficient.

Rink v. Lowry, 132, 136 (2).

9. *Complaint.—Ejectment.—"Or."*—A complaint alleging that plaintiffs are the trustees of "the Christian Church, or Church of Christ," at a certain town, and as such are entitled to the possession of certain premises, and that defendants as trustees of "the Christian Church" at said town now hold possession of such premises without right, states a cause of action, there being nothing to show that by the use of "or" two churches were described.

Bush v. Bullington, 587.

10. *Complaint.—Execution.—Supplemental Proceedings.—Surplusage.—Statutes.*—A complaint showing that plaintiff recovered a judgment against defendant; that execution was returned unsatisfied; that defendant is a resident of the county; that his codefendant owes him money which an execution will not reach and which the defendant "wrongfully refuses and fails to apply to the satisfaction of said judgment," states a cause of action under §§827, 831 Burns 1901, §§815, 819 R. S. 1881, the quoted clause being treated as surplusage.

Hobbs v. Town of Eaton, 628, 631 (3).

PLEADING—Continued.

11. *Complaint.—Exhibits.—How Made.—Order-Book Entries.*—An exhibit to a complaint which is not physically attached thereto is a part thereof, where the complaint makes it a part thereof by reference; and a separate order-book entry of the filing thereof is not necessary.
Cleveland, etc., R. Co. v. Porter, 226, 228 (2).
12. *Complaint.—Fraud.—Averments of.—Facts.*—Averments of fraud are unnecessary in a complaint where the facts stated show actual or constructive fraud.
Holliday v. Perry, 588, 598 (11).
13. *Complaint.—Damages.—Misrepresentations of Law and Fact.*—A complaint for damages for misrepresentations of matters of law and fact is good if it contains enough allegations of misrepresentations of facts to constitute a cause of action.
Lindley v. Kemp, 355, 368 (7).
14. *Complaint.—Guaranty.—Past-Due Accounts.—Consideration.*—A complaint declaring upon a written guaranty of a past-due account must show a valuable consideration therefor, an allegation that such guaranty was made "for a valuable consideration" being a conclusion and therefore insufficient.
Kingan & Co. v. Orem, 207, 210 (4).
15. *Complaint.—Exhibits.—Contracts.—Injunction.*—A complaint to prevent a gas company from violating its contract to furnish plaintiff gas so long as the supply lasts, which fails to set out a copy of such contract or an exhibit thereof, is bad.
Elwood, etc., Oil Co. v. Glaspy, 634.
16. *Complaint.—Insurance.—Mutual Benefit.—Beneficiaries.*—A complaint showing that plaintiff is the beneficiary of a benefit life certificate in defendant insurance order; that his father was a member thereof and performed all conditions to be performed and that plaintiff performed all conditions to be by him performed, states a cause of action.
Grand Lodge, etc., v. Barwe, 308, 310 (3).
17. *Complaint.—Insurance.—Life.—Extension.*—A complaint for the recovery of insurance, alleging that plaintiff's decedent duly paid four annual premiums on a twenty-payment life policy, by which he secured an extension of such policy for 10 years by virtue of the table of extended insurance, and that decedent died within such time, shows that such policy was alive at decedent's death.
Union Mut. Life Ins. Co. v. Adler, 530, 538 (5).
18. *Complaint.—Insurance.—Conditions.—Performance by Plaintiff.—"Duly."*—A complaint upon an insurance policy alleging that plaintiff "has duly performed all the conditions on his part to be performed," sufficiently alleges performance by plaintiff, the word "duly" neither adding to, nor detracting from, such allegation. *Home Ins. Co. v. Gagen*, 680, 684 (2).
19. *Complaint.—Insurance.—Conditions.—Performance.—Allegations.*—A complaint upon an insurance policy alleging that plaintiff "has performed all the conditions on his part to be performed," sufficiently advises defendant and the court that the conditions mentioned refer to the conditions of the policy sued upon.
Home Ins. Co. v. Gagen, 680, 684 (3).

PLEADING—Continued.

20. *Complaint.—Insurance.—Conditions.—Performance.—General Allegations.—Particular.*—Where a general allegation of performance by plaintiff is made in a complaint on an insurance policy, a particular averment which does not contradict such allegation does not injure such complaint.
Home Ins. Co. v. Gagen, 680, 684 (4).
21. *Complaint.—Paragraphs.—Insurance.—Conditions.—General Allegation of Performance.—Waiver.*—The waiver, by defendant, of a condition in an insurance policy is inconsistent with a general performance by plaintiff of all the conditions of such policy, it being necessary to make allegations of waiver and performance in different paragraphs of the complaint.
Home Ins. Co. v. Gagen, 680, 685 (5).
22. *Complaint.—Insurance.*—A complaint showing that defendant executed a policy of insurance on plaintiff's barn, covering loss thereof by lightning, in consideration of the payment of a certain premium; that such barn was destroyed by lightning; that plaintiff performed all conditions on his part and that plaintiff sustained by reason thereof a certain loss, is sufficient on demurrer.
Home Ins. Co. v. Gagen, 680, 685 (7).
23. *Complaint.—Judicial Sales.—Purchase Price.—Inadequacy.—Presumptions.*—In order to set aside a judicial sale on the ground of the inadequacy of the purchase price, it is necessary to allege such fact, the presumption being that the property sold for its cash value.
Fuller v. Exchange Bank, 570, 572 (2).
24. *Complaint.—Review of Judgment.*—A complaint to review a judgment for the reason that the complaint upon which such judgment was founded was insufficient, is unsupported where such original complaint stated a valid cause of action.
Grand Lodge, etc., v. Barwe, 308, 310 (2).
25. *Complaint.—Levees and Dikes.—Statutes.*—Under §7222 Burns 1901, Acts 1889, p. 104, §21, a formal complaint by the complaining party in an assessment of damages and benefits on account of the construction of levees and dikes is unnecessary.
Lewis Tp. Improv. Co. v. Royer, 151, 154 (1).
26. *Complaint.—Levees.—Assessment of Damages.*—On appeal to the circuit court from an assessment of damages for the construction of a levee, a complaint showing that the appellant is the owner of certain real property in fee simple; that the appraisers erred in the assessment of damages as to such property; that his damages are \$1,200 instead of \$90 as assessed; that he is the owner of another tract and is damaged therein \$1,200, and that said assessment gave him nothing, and praying that an issue be made and the cause tried, is sufficient to state a cause of action when attacked for the first time on appeal to the Appellate Court.
Lewis Tp. Improv. Co. v. Royer, 151, 155 (7).
27. *Complaint.—Master and Servant.—Work Outside Scope of Employment.—Variance.*—Where the complaint proceeds upon the theory of an injury to the servant, caused by dangerous work outside of the scope of his employment, and the proof shows that he was working within the scope thereof, a verdict in his favor is not supported.
Adams v. Central Ind. R. Co., 607, 610 (1).

PLEADING—Continued.

28. *Complaint.—Master and Servant.—Negligence.—Several Acts of.—Proof of One.*—Where the servant alleges several acts of negligence of the master in causing his injuries, proof of one of such acts is sufficient to support a judgment for plaintiff. *Bedford Quarries Co. v. Turner*, 552, 563 (2).
29. *Complaint.—Master and Servant.—Factory Act.—Dangerous Machinery.—Guarding.*—A complaint in an action by a servant for injuries caused by the master's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) in failing to guard dangerous machinery, must show affirmatively that such machinery was capable of being guarded without rendering it useless for its intended work. *National Fire Proofing Co. v. Roper*, 600, 606 (2).
30. *Complaint.—Master and Servant.—Negligence.—Mines.—Statutes.*—A complaint showing that defendant employed 100 men in its coal mines; that defendant failed to keep on hand a supply of props, caps and timbers to secure the roof of the mines; that its mining boss failed to inspect the rooms oftener than once a week; that it failed to provide a blackboard on which the miners could register their orders for timber for supporting the roof of the mine and that by reason thereof decedent was killed, states a cause of action under the act of 1891 (Acts 1891, p. 57, §13, §7473 Burns 1901). *Collins Coal Co. v. Hadley*, 637, 642 (1).
31. *Complaint.—Mechanics' Liens.—Basis of Suit to Foreclose.*—The contract between the material man and the contractor of a building is not the basis of a suit for the foreclosure of a lien in favor of such material man and an exhibit thereof is not necessary in the complaint. *Siegmund v. Kellogg-Mackay-Cameron Co.*, 95, 98 (4).
32. *Complaint.—Jurisdiction of the Person.—Demurrer for Want of Facts.—Presumptions.*—A complaint on a note and for the foreclosure of a chattel mortgage recorded in J. county and showing that defendants at the time of its execution resided in J. county does not on its face show a want of jurisdiction over defendants as against a demurrer for want of facts, although such complaint fails to show that defendants were residents of B. county, in which the suit was brought, at the time of the filing thereof, there being a presumption of jurisdiction. *Rudisell v. Jennings*, 403, 405 (1).
33. *Complaint.—Bills and Notes.—Chattel Mortgages.—Foreclosure.—Indefinite Description.*—A complaint on a note and for the foreclosure of a chattel mortgage is good, though the description of the mortgaged property be insufficient. *Rudisell v. Jennings*, 403, 406 (3).
34. *Complaint.—Foreclosure of Mortgages.—Suit to Redeem.—Offer to Pay.*—Where the mortgagee purchased plaintiff's lands under the decree foreclosing its mortgage and it and its grantee have had the rents and profits therefrom for several years, it is not necessary for plaintiff, in a suit to redeem, to offer to pay such mortgage, his offer to pay the amount found to be due upon an accounting between the parties being sufficient. *Aetna Life Ins. Co. v. Stryker*, 312, 328 (11).
35. *Complaint.—Negligence.—Municipal Corporations.—Streets.—Defects.*—A complaint showing that defendant city knowingly permitted a dangerous hole to remain in a street shows

PLEADING—Continued.

negligence; and an allegation that it "negligently" left such hole open and unguarded is not an additional act of negligence.

City of Indianapolis v. Mullally, 125, 127 (1).

36. *Complaint.—Municipal Corporations.—Defective Streets.*—Notice.—A complaint alleging that plaintiff was driving with due care along a street; that by reason of a dangerous hole's being "left open and unguarded of which he had no knowledge" he fell into same, sufficiently negatives notice of such defect on plaintiff's part.

City of Indianapolis v. Mullally, 125, 128 (2).

37. *Complaint.—Bonds.—Surviving Partners.*—A complaint on a surviving partner's bond alleging that such partner failed and refused to discharge his duties, setting out such failures, is sufficient as against a general demurrer, one well-assigned breach being sufficient.

Harrah v. State, ex rel., 495, 503 (8).

38. *Complaint.—Principal and Agent.—Receipt.—Authority of Agent.*—An allegation in a complaint that defendant bank, by its attorney, receipted for certain money, affirms the authority of such attorney to receipt for such bank.

Fuller v. Exchange Bank, 570, 572 (1).

39. *Complaint.—Quieting Title.—Prescription.—State.*—A complaint to quiet title filed in 1903 and alleging that plaintiff has held undisputed and adverse possession of real estate for thirty-eight years is insufficient as against the State, since it fails to show such possession for twenty years continuously prior to 1881.

McCaslin v. State, 184, 186 (3).

40. *Complaint.—Quieting Title.—Prescription.—State.*—A complaint to quiet title alleging that plaintiff took exclusive possession of such real estate in 1860 and that the State's claim of title is unfounded and is a cloud thereon, is bad since it fails to show that plaintiff held such possession any length of time after acquiring it.

McCaslin v. State, 184, 187 (4).

41. *Complaint.—Partition.—Quieting Title.—Presumptions.*—The presumption that title was not in issue in a partition suit is not overthrown by allegations, in an answer, that such suit was to quiet title, that plaintiff sought to have her title quieted and that title was in issue.

Pence v. Long, 63, 75 (10).

42. *Complaint.—Torts.—Covenants.—Interurban Railroads.—Killing Stock.*—A complaint against an interurban railroad company for damages for permitting oil and paint to remain upon its premises, whereby plaintiff's cow was killed, is in tort and is not founded upon a breach of its covenant to keep its right of way fenced.

Indianapolis, etc., Traction Co. v. Harbaugh, 115, 116 (2).

43. *Complaint.—Street Railroads.—Failure to Look.*—A complaint alleging that the motorman of defendant street railroad company negligently failed to look ahead; that by the exercise of reasonable care he could have seen plaintiff in his dangerous position on the track from which he could not extricate himself, and that by reason of such negligence plaintiff was injured, is sufficient, when attacked for the first time on appeal.

Indianapolis Traction, etc., Co. v. Smith, 160, 165 (4).

PLEADING—Continued.

44. *Complaint.—Railroads.—Negligence.—Different Acts of.—Whether Joint or Several.*—A complaint alleging that defendant railroad company negligently ran its train at an excessive rate of speed, that it failed to sound its whistle, that it failed to ring its bell, and that plaintiff's decedent was killed on defendant's highway crossing by reason of the negligence "as aforesaid," relies upon such negligent acts severally and not jointly, and proof of one of such acts sustains such complaint. *Southern R. Co. v. Jones*, 33 Ind. App. 333, distinguished. *New York, etc., R. Co. v. Robbins*, 172, 174 (1).
45. *Complaint.—Railroads.—Car Inspection.—Negligence.*—A complaint showing that transfer tracks were used by two railroad companies for switching cars from one to the other; that plaintiff, a car inspector, was required to inspect all cars set upon such tracks before 6 o'clock p. m. of each day; that defendant set some cars on one of such tracks and closed the switch; that defendant a short while afterwards switched a box-car with a defective brake upon such track and negligently opened such switch and such box-car struck the cars under which plaintiff was working, injuring plaintiff, is insufficient, since it shows that defendant had a right to use the track, and fails to show that it had any notice that plaintiff was under the cars at the time. *Lake Erie, etc., R. Co. v. Hennessey*, 574.
46. *Complaint.—Exhibits.—Railroads.—Fences.—Repairs.*—The itemized statement of the cost of erecting a fence on a railroad right of way is not a necessary exhibit to a complaint by an abutting landowner against such company for the cost of constructing such fence, a direct allegation in the complaint of such items being sufficient. *Vandalia R. Co. v. Kanarr*, 146, 147 (1).
47. *Complaint.—Inconsistent Averments.—Railroads.—Negligence.*—An averment that defendant railroad company's train left the track because of rotten and defective ties, which would not hold the spikes, thus causing the rails to spread, and an averment that such train was derailed because of a broken axle, are inconsistent, but such inconsistency does not render such complaint bad. *Southern R. Co. v. Roach*, 211, 214 (2).
48. *Complaint.—Railroads.—Car Inspection.—Defective Axle.*—A complaint alleging that it was defendant railroad company's duty to inspect its cars at H.; that it kept a switch-yard at such point and maintained a car inspector there and that it failed to inspect the car causing the injuries, sufficiently shows, though not in terms, that the car causing the injuries passed through such yards. *Southern R. Co. v. Roach*, 211, 214 (3).
49. *Complaint.—Carriers.—Railroads.—Passengers.—Position on Train.*—A complaint by a passenger against his carrier for damages caused by a derailment of the train, is not bad because it fails to state at what place on the train plaintiff was riding when injured. *Southern R. Co. v. Roach*, 211, 215 (5).
50. *Complaint.—Joint Negligence.—Railroads.*—A complaint showing that injuries were received in consequence of the several acts of negligence of three railroad companies using a single track, properly joins such three companies as defendants, an allegation of preconcerted action being unnecessary. *Chicago, etc., R. Co. v. Marshall*, 217, 222 (4).

PLEADING—Continued.

51. *Complaint.—Railroads.—Negligence.*—A complaint against three railroad companies alleging that plaintiff was injured by the carelessness of said companies "in the running of their said trains and in their neglect and carelessness in giving and receiving and executing orders for the running of said trains, and in the careless and negligent manner that said trains were left standing on the tracks," and by the "neglect of said defendants to observe the targets and danger signals, and in the running of said trains at a high and ungovernable rate of speed," is bad, since such allegations are too indefinite as to the acts constituting negligence.

Chicago, etc., R. Co. v. Marshall, 217, 223 (5).

52. *Complaint.—Sales.—Merchandise in Bulk.—Statutes.—Recovery.*—No recovery can be permitted upon a complaint asserting rights under the act of 1901 (Acts 1901, p. 505, §§6637a, 6637b Burns 1901), prohibiting the sale of merchandise in bulk except under certain conditions, since such statute is unconstitutional.

Kingan & Co. v. Orem, 207, 210 (2).

53. *Complaint.—Telegraphs and Telephones.—Messages.—Discrimination.*—A complaint against a telegraph company showing that it acted in bad faith, with negligence, partiality and discrimination, and neglected to transmit plaintiff's message in the order in which it was received, sufficiently shows a violation of the statute (§5511 Burns 1901, Acts 1885, p. 151, §1) requiring messages to be transmitted impartially.

Western Union Tel. Co. v. McClelland, 578, 583 (1).

54. *Complaint.—Telegraphs and Telephones.—Messages.—Willful Failure to Transmit.—Negligence.*—A complaint to recover the penalty provided by statute (§5512 Burns 1901, Acts 1885, p. 151, §3) for failure to deliver a telegraph message, which alleges negligence and wilfulness as the cause of such failure, is sufficient, since a failure from either cause renders the company liable.

Western Union Tel. Co. v. McClelland, 578, 583 (2).

55. *Complaint.—Trusts.—Resulting.—Payment of Purchase Money.*—A complaint showing that defendant, by an agreement with plaintiffs, advanced, as a loan to them, their third of the purchase money for a tract of land, sufficiently shows payment thereof by the plaintiffs.

Holliday v. Perry, 588, 596 (4).

57. *Complaint.—Theory.—Sufficiency.*—A complaint drawn upon a definite theory should be good upon such theory, or is bad on demurrer.

Union Mut. Life Ins. Co. v. Adler, 580, 586 (1).

58. *Complaint.—Theory.*—Every complaint must proceed upon a definite theory.

Holliday v. Perry, 588, 598 (8).

59. *Complaint.—Theory.—Trial.—Demurrer.—Appeal and Error.*—The theory of the complaint acquiesced in by the parties on the trial below, will govern on appeal; but on demurrer for want of facts, a complaint will be held good on appeal if the facts show a cause of action on any theory.

Holliday v. Perry, 588, 598 (9).

PLEADING—Continued.

60. *Complaint.—Facts.—Want of Theory.*—A demurrer to a complaint does not lie because of a want of a theory, but for want of sufficient facts. *Holliday v. Perry*, 588, 598 (10).
61. *Complaint.—Demurrer for Want of Facts.—Plaintiff's Right to Sue.*—A demurrer for want of facts to a complaint properly questions plaintiff's right to sue.
Collins Coal Co. v. Hadley, 637, 645 (4).
62. *Complaint.—Construction.—Doubt.*—A pleading, in cases of doubt, will be construed most strongly against the pleader.
Cool v. McDill, 621, 622 (1).
63. *Complaint.—Theory.—Construction by Trial Court.*—A complaint will be construed on appeal according to the construction adopted and acquiesced in by the parties at the trial.
Cool v. McDill, 621, 623 (2).
64. *Complaint.—Action.—Sufficiency of Facts.—Surplusage.*—A complaint stating facts sufficient to constitute a single, consistent cause of action is good, though it contain surplus facts relating to a different cause of action.
Home Ins. Co. v. Gagen, 680, 685 (6).
65. *Complaint.—Allegations.—Inferences.*—A complaint, when questioned by demurrer, must allege the necessary facts directly, mere inferences or probabilities based upon conjectures being insufficient.
National Fire Proofing Co. v. Roper, 600, 606 (8).
66. *Complaint.—Initial Attack on Appeal.*—A complaint attacked for the first time on appeal will be held sufficient if it states facts sufficient to bar another action for the same cause.
Over v. Dehne, 427, 431 (2).
67. *Complaint.—Recital of Evidence.—Motion to Make More Specific.*—A complaint should not plead the evidence; and if a complaint is obscure a motion to make more specific is the remedy.
Lewis Tp. Improv. Co. v. Royer, 151, 154 (3).
68. *Complaint.—Demurrer.—Construction.—Intendments.—Appeal and Error.*—A complaint, attacked by a demurrer in the trial court, must be construed on appeal with reference to its containing facts sufficient to constitute a cause of action, and without reference to any intendments indulged to cure a defective complaint after verdict, where not attacked by demurrer.
Chicago, etc., R. Co. v. Marshall, 217, 225 (6).
69. *Duplicity.—Motion to Paragraph.—Striking Out.*—A motion to paragraph or strike out is the proper remedy for a complaint which is bad for duplicity.
Western Union Tel. Co. v. McClelland, 578, 583 (3).

POLICE POWER—

Railroads may be compelled, by exercise of, to fence right of way, see CONSTITUTIONAL LAW, 2; *Chicago, etc., R. Co. v. Irons*, 196, 197 (1).

State may prohibit sale of liquor on holidays under, see STATUTES, 12; *State v. Shelton*, 80, 86 (3).

Protection of Private Right.—Public Policy.—Enlightened public policy and a quickened public conscience demand that on holidays when people congregate in large numbers they shall be safeguarded in their private rights by the prevention of the doing of those things which are liable to incite riots and create discord.
State v. Shelton, 80, 89 (9).

POSSESSION—

Remedy of the State to secure, see **QUIETING TITLE**, 2; *McCaslin v. State*, 184, 188 (6).

PRESCRIPTION—

See **EASEMENTS**.

Since 1881, does not obtain against State, see **PLEADING**, 39, 40; *McCaslin v. State*, 184.

PRINCIPAL AND AGENT—

Sufficiency of complaint in showing authority of agent, see **PLEADING**, 38; *Fuller v. Exchange Bank*, 570, 572 (1).

PRINCIPAL AND SURETY—

Wife is not surety on note for money used in partnership of which she was a member, see **HUSBAND AND WIFE**, 3; *Anderson v. Citizens Nat. Bank*, 190, 193 (5).

Judgment against wife for amount of note for which she was principal and in her favor for amount for which she was surety, proper, see **JUDGMENT**, 3; *Rudisell v. Jennings*, 403, 406 (4).

Principal upon delivery bond is primarily liable, and he should save his surety harmless, see **EXECUTION**, 3; *Hubbard v. Security Trust Co.*, 156, 158 (3).

Surety is subrogated to the rights of the judgment creditor when he has to pay the debt, see **SUBROGATION**, 2; *Hubbard v. Security Trust Co.*, 156, 158 (4).

PROVOKE—

Intent, an essential element of, see **ATTEMPTS**, 1; *Heard v. State*, 511, 512 (1).

PROXIMATE CAUSE—

See **NEGLIGENCE**.

PUBLIC POLIOY—

Forbids monopolies, see **MONOPOLIES**; *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 238 (1).

Requires enforcement of liquor laws on holidays, see **POLICE POWER**; *State v. Shelton*, 80, 89 (9).

QUIETING TITLE—

Complaints for, see **PLEADING**, 39-41.

Answer showing that title was quieted in former suit for partition, see **PLEADING**, 41; *Pence v. Long*, 63, 75 (10).

Title not usually quieted in ordinary partition suit, see **PARTITION**, 2, 3; *Pence v. Long*, 63, 74 (8), (9).

1. *New Trial as of Right.—Failure to Vacate Former Judgment.—Appeal and Error.*—The granting of a new trial in quieting title cases, upon the filing of a proper bond, is mandatory; and the Appellate Court will direct the prior decree to be set aside where a new trial was granted but such former decree was not formally set aside. *Richardson v. Stephenson*, 339, 340 (1).

QUIETING TITLE—Continued.

2. *State.—Statutes.*—Section 7164 Burns 1901, Acts 1883, p. 170, §3, providing a remedy for the State to pursue to secure possession of its lands, is not applicable to a case to determine the title to lands, such question being for adjudication by the courts. *McCaslin v. State*, 184, 188 (6).
3. *Defense.—Fraud Against Third Parties.*—It is no defense that the plaintiff in a suit to quiet title obtained his title by fraud practiced upon third parties where such title is not disaffirmed. *Pence v. Long*, 63, 76 (14).

RAILROADS—

- See CARRIERS; CONTRACTS; INTERURBAN RAILROADS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILROADS; TRIAL.
- Contract to fence right of way runs with the land, see COVENANTS; *Indianapolis, etc., Traction Co. v. Harbaugh*, 115, 121 (6).
- Contract not to build a depot at a certain place illegal, see CONTRACTS, 8; *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 234, 239 (4).
- As to validity of railroad commission act, see CONSTITUTIONAL LAW, 3-6; *Chicago, etc., R. Co. v. Railroad Com.*, etc., 439.
- May be compelled to fence right of way, see CONSTITUTIONAL LAW, 2; *Chicago, etc., R. Co. v. Irons*, 196, 197 (1).
- Sufficiency of fence, question for jury, see APPEAL AND ERROR, 66; *Chicago, etc., R. Co. v. Irons*, 196, 197 (2).
- Whether whistle was sounded for crossing, question for jury, see APPEAL AND ERROR, 65; *New York, etc., R. Co. v. Robbins*, 172, 176 (2).
- Appeals from commission are governed by special statute and not by general law, see APPEAL AND ERROR, 56; *Chicago, etc., R. Co. v. Railroad Com.*, etc., 439, 449 (2).
- Appeals from commission's orders as to crossings lie to the circuit or superior, but not to the Appellate Court, see APPEAL AND ERROR, 55; *Grand Rapids, etc., R. Co. v. Railroad Com.*, etc., 657, 658 (2).
- When appeals from orders of railroad commission lie, see APPEAL AND ERROR, 54; *Grand Rapids, etc., R. Co. v. Railroad Com.*, etc., 657, 658 (1).
- Sufficiency of evidence to show setting of fires, see NEW TRIAL, 13; *Baltimore, etc., R. Co. v. O'Brien*, 143, 146 (4).
- Sufficiency of evidence to establish claim for attorneys' fees in fence building case, see NEW TRIAL, 9; *Terre Haute, etc., R. Co. v. Salisbury*, 100, 103 (2).
- Complaints against, for negligence, see PLEADING, 44-51.
- Negligence not presumed from fact alone that fire escaped from engine, see TRIAL, 37; *Baltimore, etc., R. Co. v. O'Brien*, 143, 144 (1).
1. *Fences. — Attorneys' Fees. — Statutes.*—Where the record shows that plaintiff's attorney filed his suit, prosecuted it to a decision and that a reasonable fee was a certain sum, a judgment making an allowance for such attorney is sustained by the evidence. *Terre Haute, etc., R. Co. v. Salisbury*, ante, 100, followed. *Chicago, etc., R. Co. v. Irons*, 196, 198 (3).

RAILROADS—Continued.

2. *Fences.—Repairs.—Notice.*—A notice by an abutting landowner to a railroad company that it has no fence on its right of way, and that unless it builds one within thirty days he will do so, is sufficient under §5324 Burns 1901, Acts 1885, p. 224, §2, though there was an old fence in such a state of repair that a new fence was necessary, a statement of the probable cost in such case being unnecessary.

Vandalia R. Co. v. Kanarr, 146, 148 (2).

3. *Fences.—Repairs.—Notice.*—A notice directed to the Terre Haute & Indianapolis Railroad Company to repair a fence along its right of way, delivered to the proper agent of the Terre Haute & Logansport Railway Company and by such agent sent to the home office of his company, and describing particularly the location of such fence, is sufficient as to such latter company.

Vandalia R. Co. v. Kanarr, 146, 151 (3).

4. *Rights of Way.—Fences.—Liens.*—Under the statutes (§§5323-5325 Burns 1901, Acts 1885, p. 224), providing that railroad companies must fence their rights of way so as to turn stock and "may" use barbed wire, and in case of failure the abutting landowner may erect same and retain a lien therefor, such landowner may recover for a fence made of woven wire with two barbed wires at the top, though such fence was costlier than barbed wire.

Terre Haute, etc., R. Co. v. Salisbury, 100, 101 (1).

5. *Fences.—Attorneys' Fees.—Statutes.—Validity.*—The statute (§§5324, 5325 Burns 1901, Acts 1885, p. 224), providing for the recovery of attorneys' fees in the foreclosure of liens for fencing railroad companies' rights of way, is valid.

Terre Haute, etc., R. Co. v. Salisbury, 100, 103 (3).

6. *Highway Crossings.—Traveler on Crossing.—Presumption.*—The presumption is that a traveler will not knowingly or voluntarily attempt to cross a railroad in view of imminent danger.

New York, etc., R. Co. v. Robbins, 172, 181 (7).

7. *Highway Crossings.—Signals.—Contributory Negligence.*—The failure by a railroad company to sound the statutory signals at a highway crossing does not relieve a traveler from the exercise of reasonable care.

New York, etc., R. Co. v. Robbins, 172, 182 (8).

8. *Permitting Combustibles on Right of Way.—Setting Fires.*—Railroad companies are liable for fires caused by reason of their suffering combustibles to remain on their right of way and thereby communicating fires to adjoining owners.

Baltimore, etc., R. Co. v. O'Brien, 143, 145 (2).

9. *Negligence.—Turntables.*—A railroad company may be guilty of negligence toward a child in leaving unguarded and unlocked its turntable.

Chicago, etc., R. Co. v. Fox, 238, 273 (1).

10. *Negligence.—Turntables.—Implied Invitation.*—A railroad company, leaving its turntable open and unfastened, may be guilty of negligence toward a child by reason of an implied, though unintentional, invitation to use same.

Chicago, etc., R. Co. v. Fox, 268, 275 (2).

11. *Use of Property.—Maxims.*—The maxim, "So use your own as not to injure another," is applicable to a railroad company's leaving open and unfastened a turntable where children are in the habit of congregating for play.

Chicago, etc., R. Co. v. Fox, 268, 276 (3).

RAILROADS—Continued.

12. *Turntables.—Care Required.—Question for Jury.—*Ordinary care is required from a railroad company in the prevention of injuries to children who may thoughtlessly use its turntable, such question being usually for the jury.
Chicago, etc., R. Co. v. Fox, 268, 277 (4).
13. *Rates.—Companies' Power to Fix.—Rights of State.—*Although the statute (§5153 Burns 1901, §3903 R. S. 1881) has given railroad companies the power to fix rates, nevertheless the legislature has the power to regulate and fix such rates.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 450 (3).
14. *Rates.—Power to Fix.—*The legislature may prescribe railroad rates itself, delegate the power to a commission or give the power to the railroad companies, but such rates by whomsoever made, must be reasonable.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 450 (4).
15. *Rates.—Recovery of Unreasonable.—*The shipper may recover from a railroad company charges in excess of a reasonable rate.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 450 (5).
16. *Rates.—Railroad Commission.—Power to Determine.—*Under the act of 1905 (Acts 1905, p. 83), it is the duty of the railroad commission, when a complaint in writing is filed, alleging that a rate is unreasonable, to determine such question, and, if such rate is found unreasonable, to set it aside and establish a reasonable one.
Chicago, etc., R. Co. v. Railroad Com. etc., 439, 450 (6).
17. *Rates.—Railroad Commission.—Powers.—Review by Courts.—*Rates fixed by the railroad commission under the act of 1905 (Acts 1905, p. 83) are subject to review by the courts on the ground of unreasonableness, such question being a judicial one for the courts. Black, J., dissenting.
Chicago, etc., R. Co. v. Railroad Com., etc., 439, 453 (8).
18. *Interlocking Devices.—Railroad Commission.—Appeal and Error.—*The railroad commission act (Acts 1905, p. 83) vests in such commission the authority theretofore vested in the Auditor of State in reference to interlocking devices, and whether an appeal lies from an order concerning such must be determined from such act.
Grand Rapids, etc., R. Co. v. Railroad Com., etc., 657, 658 (3).

RATES—

Power of railroad commission to fix, see **RAILROADS**.

REAL PROPERTY—

See **LIFE ESTATES; WILLS**.

Location of, may be shown by parol, see **EVIDENCE**, 18; *Littler v. Robinson*, 104, 108 (3).

Sufficiency of evidence to show ownership, see **NEW TRIAL**, 10; *Littler v. Robinson*, 104, 108 (4).

Parol trusts in, as between husband and wife, see **TRUSTS**, 1; *Shipley v. Shipley*, 48, 50 (1).

RECEIVERS—

May be appointed, where surviving partner fails to do his duty, see **PARTNERSHIP**, 3; *Harrah v. State, ex rel.*, 495, 502 (2).

Surety paying debtor's delivery bond is entitled to priority, see **SUBROGATION**, 3; *Hubbard v. Security Trust Co.*, 156, 160 (7).

Relation to Creditors.—Executions.—The appointment of a receiver does not affect the relation of creditors to the assets in his hands, but merely suspends the ordinary remedies for the enforcement of debts.

Hubbard v. Security Trust Co., 156, 158 (1).

REDEMPTION—

See **MORTGAGES**.

REMAINDERS—

See **WILLS**.

REMOVAL OF CAUSES—

Overruling petition for, ground for a new trial and not for independent assignment of error on appeal, see **APPEAL AND ERROR**, 61; *Southern R. Co. v. Roach*, 211, 213 (1).

RES IPSA LOQUITUR—

See **EVIDENCE**.

RES JUDICATA—

See **JUDGMENT**.

RESTRAINT OF TRADE—

See **CONTRACTS**.

SALES—

See **JUDICIAL SALES**; **STATUTES**, 9-16; **VENDOR AND PURCHASER**.

Of merchandise in bulk, statute, is unconstitutional, see **PLEADING**, 52; *Kingan & Co. v. Orem*, 207, 210 (2).

1. **Conditional.—Reservation of Title.—Option of Vendor to Treat Sale as Absolute.**—A sale of goods, the vendor reserving the title until the purchase price is fully paid, is a present sale on condition, giving the vendor the right, upon default by the vendee, either to retake such goods, thus disaffirming the sale, or to treat the sale as absolute by bringing an action for the purchase price.

Jessup v. Fairbanks, Morse & Co., 673, 675 (1).

2. **Contracts.—Discharge.—Reservation of Title.**—A present contract of sale in which the vendor reserves title to the goods sold is not discharged as to the vendee by an innocent destruction of such goods; and such vendee's promise to pay can be enforced.

Jessup v. Fairbanks, Morse & Co., 673, 676 (2).

3. **Contracts.—Consideration.—Reservation of Title.**—The consideration for a contract of sale, the vendor retaining the title to the goods sold until the purchase price is paid, is the delivery of the goods with the right to acquire the title thereto.

Jessup v. Fairbanks, Morse & Co., 673, 676 (3).

4. **Reservation of Title.—Election.**—The doctrine of election is applicable to the vendor in cases of sales of goods wherein he reserves title until such goods are paid for.

Jessup v. Fairbanks, Morse & Co., 673, 677 (4).

SALES—Continued.

5. *Contracts.—Delivery by Vendor.—Refusal to Accept by Vendee.—Recovery.*—Where the vendor executes his contract by tendering the property sold and the vendee refuses to accept or pay for the same, the vendor may hold such property for such vendee and recover the contract price.
Gaar, Scott & Co. v. Fleshman, 490, 491 (1).
6. *Delivery.—Title.—Vesting.—Purchase Money.—Recovery.*—Before the vendor can recover the contract price of an article sold, he must have delivered such property or must have done such things as vest the title thereto in the vendee.
Gaar, Scott & Co. v. Fleshman, 490, 492 (2).
7. *Contracts.—Title Retained by Vendor.—Measure of Damages for Breach.*—Where the vendor retains title to the goods contracted to be sold, the measure of damages for the vendee's breach of contract is the actual injury such vendor sustains.
Gaar, Scott & Co. v. Fleshman, 490, 492 (3).
8. *Title to Remain in Vendor.—Right of Vendor to Treat Sale as Absolute.—Election.—Action for Contract Price.—Effect.*—Where a vendor in his contract of sale provides that "the title to said goods shall not pass until settlement is concluded and accepted" by such vendor, and the goods are shipped and tendered as provided for in the contract, and the vendee refuses to accept, an action by such vendor for the contract price is an election to treat the sale as absolute, and the absolute title immediately vests in the vendee.
Gaar, Scott & Co. v. Fleshman, 490, 493 (4), 494 (4).
9. *Warranty.—Notice.—Waiver.*—Where property is sold on a warranty which requires a specified kind of notice within a given time that it fails to fulfil the warranty, any notice received by the grantor and acted upon by him is a waiver of the notice required by the warranty.
Siebs v. Heilman Machine Works, 37, 41 (3).

SERVICE—

On corporations, see JURISDICTION, 2; *Chicago, etc., R. Co. v. Marshall*, 217, 222 (2).

SHELLEY'S CASE, RULE IN—

See WILLS.

SHERIFFS—

See OFFICERS.

SPECIAL FINDINGS—

See TRIAL.

STATUTE OF LIMITATIONS—

See LIMITATION OF ACTIONS.

STATUTES—

Statutes cited and construed, see p. xxvi.

See CONSTITUTIONAL LAW; TELEGRAPHS AND TELEPHONES.

Making illegitimate children heirs of their father, see DESCENT AND DISTRIBUTION, 1; *Daggy v. Wells*, 27, 28 (1).

Appeal taken under void statute confers no jurisdiction on Appellate Court, see APPEAL AND ERROR, 30; *Chicago, etc., R. Co. v. Railroad Com., etc.*, 439, 448 (1).

STATUTES—Continued.

Prohibiting sales of merchandise in bulk, unconstitutional, see PLEADING, 52; *Kingan & Co. v. Orem*, 207, 210 (2).

1. *In Pari Materia.—Construction.*—Statutes upon the same subject, passed at different times, are to be construed *in pari materia*, the latest to control in cases of conflict.

Western Union Tel. Co. v. Sefrit, 565, 569 (5).

2. *Penalties.—Construction.*—Penal statutes are strictly construed, but the whole statute must be considered.

Western Union Tel. Co. v. McClelland, 578, 585 (6).

3. *Construction.—Creating New Rights.*—Statutes creating rights not given by the common law are strictly construed, and the statutory remedies are exclusive.

Collins Coal Co. v. Hadley, 637, 644 (3).

4. *Repeal.—Right to Sue.*—The act of 1899 (Acts 1899, p. 405, §285 Burns 1901), providing generally that the personal representatives of one whose death was caused by wrongful act may maintain an action therefor, does not repeal §7473 Burns 1901, Acts 1891, p. 57, §13, giving a right of action to the widow, children, parents and dependents of a miner killed in a coal mine because of the owner's violation of the mining laws. *President, etc., v. Bradshaw*, 6 Ind. 146, and *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357, distinguished.

Collins Coal Co. v. Hadley, 637, 645 (5), 652 (5).

5. *Repeal.—Implication.*—Repeals by implication are not favored by the courts, and laws will be construed, if possible, so as to avoid such a repeal. *Collins Coal Co. v. Hadley*, 637, 646 (6).

6. *Repeal.—Presumptions.*—The legislature is presumed to know the provisions of prior laws on a subject and to repeal same by the use of express terms, if a repeal is desired.

Collins Coal Co. v. Hadley, 637, 647 (7).

7. *Reënactment of Prior.—Limiting Statutes.*—A limiting statute, virtually making an exception to a prior general statute, is not repealed by a subsequent general statute reënacting in terms or substance such prior general statute.

Collins Coal Co. v. Hadley, 637, 648 (8).

8. *Construction.—Wrongs To Be Remedied.*—In the construction and interpretation of a statute the courts will consider the wrongs the legislature sought to remedy.

Collins v. State, 625, 627 (3).

9. *Construction.—Punctuation.—Intoxicating Liquors.*—Section 7283b Burns 1901, Acts 1895, p. 248, §2, reading in part: "And no devices for amusement or music of any kind or character," properly interpreted requires a comma after the word "amusement," and it will be considered as though the comma was so inserted.

Collins v. State, 625, 628 (4).

10. *Criminal Law.—Intoxicating Liquors.—Illegal Sales.—Holidays.*—Section 2194 Burns 1901, §2098 R. S. 1881, did not prohibit the sales of intoxicating liquors on any holidays except those specifically mentioned therein.

State v. Shelton, 80, 83 (1).

11. *Holidays.—Commercial Paper.—Intoxicating Liquors.*—Section 7531 Burns 1901, Acts 1891, p. 394, designating certain

STATUTES—Continued.

- days as holidays with reference to commercial paper, did not designate such days as holidays with reference to the sale of intoxicating liquors. *State v. Shelton*, 80, 84 (2).
12. *Holidays.—Intoxicating Liquors.—Police Power.*—The legislature has the power to designate holidays; and under the police power it may prohibit the sale of intoxicating liquors on such days. *State v. Shelton*, 80, 86 (3).
13. *Construction.—Meaning of Words.*—The words of a statute will be given their ordinary meaning, unless the context shows that they were used in a different sense. *State v. Shelton*, 80, 87 (4).
14. *Title.—Limitations.—Construction.*—Where the title of an act limits the act to certain purposes, such act will be construed as effective only as limited thereby. *State v. Atkinson*, 139 Ind. 426, distinguished. *State v. Shelton*, 80, 87 (6).
15. *In Pari Materia.*—Statutes, concerning the same subject-matter, passed at the same session, will be construed *in pari materia* if possible. *State v. Shelton*, 80, 88 (7).
16. *Holidays.—Intoxicating Liquors.—Illegal Sales.—“Labor Day.”*—Under the act of 1905 (Acts 1905, p. 196) making “labor day” a legal holiday, and the act of 1905 (Acts 1905, pp. 584, 721, §579) prohibiting the sale of intoxicating liquors on “any legal holiday,” it is a crime to sell intoxicating liquors on “labor day.” *State v. Shelton*, 80, 89 (8).

STENOGRAPHERS—

Failure to appoint stenographer, not ground for a new trial, see **NEW TRIAL**, 7; *Rudisell v. Jennings*, 403, 407 (5).

STREET RAILROADS—

Complaint against, for motorman's failure to look ahead, thus causing injuries, see **PLEADING**, 43; *Indianapolis Traction, etc., Co. v. Smith*, 160, 165 (4).

Instructions in personal injury cases, see **TRIAL**, 21-25; *Indianapolis Traction, etc., Co. v. Smith*, 160.

1. *Passengers.—Who Are.*—Persons boarding a street car which stops upon the street are passengers thereon, such stopping, in the absence of notice to the contrary, being an invitation to take passage; and payment of fare is not essential to make such persons passengers. *Hall v. Terre Haute Electric Co.*, 43, 46 (3).
2. *Person in Peril.—Duty of Company.*—It is the duty of a street railroad company when it sees a person in peril from the operation of its cars to act so as not to increase such danger. *Indianapolis Traction, etc., Co. v. Smith*, 160, 165 (3).
3. *Passengers.—Riding on Running-Board.—Contributory Negligence.*—A passenger riding on the running-board of a street car is not guilty of contributory negligence as a matter of law. *Union Traction Co. v. Sullivan*, 513, 519 (1).
4. *Care Required.—Passengers.—Presumptions.*—A passenger on a street car has the right to presume that all necessary precautions have been taken by the company for his safe transportation. *Union Traction Co. v. Sullivan*, 513, 520 (4).

STREET RAILROADS—Continued.

5. *Passengers.—Contributory Negligence.—Questions for Jury.*—A passenger on a street car, who knowingly exposes himself to a danger such as ordinarily prudent men would not incur, or who, by the exercise of ordinary care, could avoid danger and who fails to do so, is guilty of contributory negligence, and these questions are usually for the jury.
Union Traction Co. v. Sullivan, 513, 520 (5).
6. *Passengers.—Riding on Running-Board.—Presumptions.*—Passengers riding on the running-board of a street car are presumed to be so riding with the consent of the company.
Union Traction Co. v. Sullivan, 513, 521 (6).
7. *Bridges.—Passengers.—Notice.—Contributory Negligence.—Questions for Jury.*—Because a passenger knows of a bridge and has ridden over it, does not, as a matter of law, render him guilty of contributory negligence in riding over same on the running-board of a street car, such question being for the jury.
Union Traction Co. v. Sullivan, 513, 522 (7).
8. *Passengers.—Notice of Defects.—Contributory Negligence.—Question for Jury.*—It is a question for the jury whether plaintiff was guilty of contributory negligence in riding, facing backward, on the running-board of a street car through a bridge of which he had a general knowledge and in which he was struck by a post and injured, the car being crowded except the front vestibule, and the conductor knowing of plaintiff's position, the fact that no other person was ever so injured being a fact for the jury's consideration.
Union Traction Co. v. Sullivan, 513, 522 (8).

SUBROGATION—

1. *On What Depends.*—The doctrine of subrogation is independent of contract relations, and applies in all cases where another in good conscience ought to pay.
Hubbard v. Security Trust Co., 156, 158 (2).
2. *Surety on Delivery Bond.—Receivers.*—The surety on a delivery bond is subrogated to the rights of the judgment creditor, as against the receiver for the judgment debtor, where such surety has been compelled to pay such bond; and it is not necessary that the question of suretyship be adjudicated in the statutory manner, in order for him to claim such right of subrogation.
Hubbard v. Security Trust Co., 156, 158 (4).
3. *Surety.—Executions.—Receivers.—Appeal and Error.*—The surety on a delivery bond, who is compelled to pay such bond, is entitled to priority in his claim filed with the receiver of the execution debtor, and if such priority be denied by the trial court, he may appeal.
Hubbard v. Security Trust Co., 156, 160 (7).

SUPPLEMENTAL PROCEEDINGS—

See EXECUTION.

SUPREME COURT—

See COURTS.

SURPLUSAGE—

See PLEADING, 64.

SURVEYS—

An official survey is *prima facie* evidence of lines and corners so located, see **BOUNDARIES**; *Korporal v. Robinson*, 110, 114 (4).

SURVIVING PARTNERS—

See **PARTNERSHIP**.

TAXATION—

Cemeteries proper, not subject to, see **CONSTITUTIONAL LAW**, 7, 8; *Oak Hill Cemetery Co. v. Wells*, 479, 481 (1), (2).

Accounting for taxes in suit to redeem, see **MORTGAGES**, 2; *Aetna Life Ins. Co. v. Stryker*, 312, 333 (18).

Cannot be used to establish private industries, see **MUNICIPAL CORPORATIONS**, 4-6; *Collier Shovel, etc., Co. v. City of Washington*, 370.

1. *Funds.—Use of.—Private Purposes.*—Taxes cannot be levied and used for private purposes.

Collier Shovel, etc., Co. v. City of Washington, 370, 373 (1).

2. *Exemption from.—Burden of Proof.*—The burden is upon the person claiming property as exempt from taxation to establish that such property is within the exemptions defined by the Constitution. *Oak Hill Cemetery Co. v. Wells*, 479, 482 (3).

3. *Cemeteries.—Used for Gain.—Statutes.*—An incorporated cemetery association in the business of selling lots for purposes of gain is not exempt from taxation under §4708a Burns 1901, Acts 1895, p. 18.

Oak Hill Cemetery Co. v. Wells, 479, 482 (4).

TELEGRAPHS AND TELEPHONES—

Complaint for failure to transmit, see **PLEADING**, 53, 54; *Western Union Tel. Co. v. McClelland*, 578, 583 (1), (2).

Injuries received while removing old poles, see **MASTER AND SERVANT**, 2; *Adams v. Central Ind. R. Co.*, 607, 611 (2).

Instruction as to discrimination in sending telegram, see **TRIAL**, 26; *Western Union Tel. Co. v. McClelland*, 578, 586 (10).

1. *Messages.—Delivery.—Negligence.—Penalties.—Statutes.*—The negligent failure to deliver a telegraphic message renders a telegraph company liable for the payment of the penalty provided by the act of 1885 (Acts 1885, p. 151, §3, §5512 Burns 1901). *Western Union Tel. Co. v. Braxtan*, 165 Ind. 165, followed. *Western Union Tel. Co. v. Sefrit*, 565, 567 (1).

2. *Negligence.—Discrimination.—Statutes.*—A failure to deliver a dispatch as required by the act of 1852 (1 R. S. 1852, p. 481, §3, §5514 Burns 1901, §4178 R. S. 1881), providing that messages shall be delivered by messenger to persons residing within one mile of the station, upon payment of charges, is a failure to "transmit" such message as required by the act of 1885 (Acts 1885, p. 151, §1, §5511 Burns 1901), providing that messages shall be transmitted with impartiality. *Reese v. Western Union Tel. Co.*, 123 Ind. 294, followed.

Western Union Tel. Co. v. Sefrit, 565, 567 (2).

3. *Messages.—Delivery.—Restrictions Upon.—Statutes.*—Telegraph companies are required by statute (§5514 Burns 1901,

TELEGRAPHS AND TELEPHONES—Continued.

§4178 R. S. 1881, 1 R. S. 1852, p. 481, §3, to deliver, by messenger, messages to persons who live within one mile of the station or within the town or city where the station is located.
Western Union Tel. Co. v. Sefrit, 565, 568 (3).

4. *Messages.—Delivery.—Statutes.*—Telegraph companies are required by the act of 1885 (Acts 1885, p. 151, §1, 3, §§5511, 5512 Burns 1901) to deliver all messages which they undertake to transmit. *Western Union Tel. Co. v. Sefrit*, 565, 569 (4).

5. *Messages.—Delivery.—Transients.—Statutes.*—The act of 1852 (1 R. S. 1852, p. 481, §3, §5514 Burns 1901, §4178 R. S. 1881) does not relieve a telegraph company from delivering a dispatch to a transient on an approaching train, when the message was addressed in care of such train's conductor, whom the operator knew and to whom he had ample opportunity to deliver such message.

Western Union Tel. Co. v. Sefrit, 565, 569 (6).

6. *Messages.—Failure to Deliver.—Discrimination.—Penalties.*—A telegraph company which negligently fails to deliver a message to a transient on an approaching train, such message being addressed in care of the conductor thereof who was well known to the operator and to whom there was opportunity to deliver, is liable for the penalty provided under either the act of 1852 (1 R. S. 1852, p. 481, §2, 3, §§5513, 5514 Burns 1901), providing for delivery of messages to persons residing within one mile of the station, or the act of 1885 (Acts 1885, p. 151, §1, 3, §§5511, 5512 Burns 1901), providing against discrimination.

Western Union Tel. Co. v. Sefrit, 565, 570 (7).

7. *Messages.—Duty to Transmit.*—It is the duty of a telegraph company under §5511 Burns 1901, Acts 1885, p. 151, §1, to transmit messages (1) impartially, (2) in their order as received and (3) without discrimination or conditions of service.

Western Union Tel. Co. v. McClelland, 578, 583 (4).

8. *Messages.—Emergencies.*—A message in form: "Send wagons to Clayton for corpse. No. 43 goes over the Van," addressed to a busman, shows on its face that an emergency exists to transmit it.

Western Union Tel. Co. v. McClelland, 578, 585 (7).

9. *Messages.—Transmission.—Overcharge.—Discrimination.*—An emergency message received at Indianapolis and not transmitted to its destination at Danville, 20 miles away, for two hours, and for which an excessive charge was paid, is, both in delay and overcharge, a violation of §5511 Burns 1901, Acts 1885, p. 151, §1, requiring messages to be transmitted without discrimination.

Western Union Tel. Co. v. McClelland, 578, 586 (8).

TENANCIES FOR LIFE—

See **LIFE ESTATES.**

TENANCIES IN COMMON—

One cotenant may sue another for an accounting, see **ACCOUNT**;
Bond v. May, 396, 399 (2).

TEXT-BOOKS—

Table of text-books cited, see p. **xxx.**

THEORY—

Necessity of, see **PLEADING**, 57-60.

TIMBER—

See **LIFE ESTATES**.

Cutting of, by reversioner, see **INJUNCTION**, 2; *Brugh v. Denman*, 486, 488 (4).

TORTS—

See **FRAUD**; **NEGLIGENCE**.

TOWNS—

See **MUNICIPAL CORPORATIONS**.

TRACTION COMPANIES—

See **INTERURBAN RAILROADS**.

TRANSFER—

From Appellate to Supreme Court, see **APPEAL AND ERROR**, 59, 60.

TRESPASS—

Injunction lies to prevent, where injury would be great, see **INJUNCTION**, 3; *Brugh v. Denman*, 486, 489 (5).

TRIAL—

See **NEW TRIAL**.

Burden of proving contributory negligence, on defendant, see **NEGLIGENCE**, 7; *New York, etc., R. Co. v. Robbins*, 172, 182 (10).

Meaning of, see **WORDS AND PHRASES**, 2; *Lindley v. Kemp*, 355, 359 (3).

Failure of a party to produce evidence within his exclusive control, raises presumption that such evidence is against him, see **EVIDENCE**, 4; *Western Union Tel. Co. v. McClelland*, 578, 587 (11).

Where passenger is injured by carrier, burden is on carrier to show injury could not be avoided, see **CARRIERS**, 5; *Cincinnati, etc., R. Co. v. Bravard*, 422, 426 (4).

Appellate Court will not disturb judgment resting upon incompetent evidence unobjected to, see **APPEAL AND ERROR**, 42; *Littler v. Robinson*, 104, 108 (2).

Precept for "special verdict" includes answers to interrogatories to jury, see **APPEAL AND ERROR**, 26; *Lindley v. Kemp*, 355, 359 (4).

Answers to interrogatories to jury are part of the record proper, see **APPEAL AND ERROR**, 25; *Lindley v. Kemp*, 355, 358 (2).

Requests for interrogatories to the jury must be submitted before argument begins, see **APPEAL AND ERROR**, 24; *People's State Bank v. Ruxer*, 420, 421 (3).

Where all instructions are not in the record, erroneous ones are presumed to have been withdrawn by those omitted, see **APPEAL AND ERROR**, 23; *People's State Bank v. Ruxer*, 420, 422 (5).

Instructions given, in absence of evidence, are presumed applicable thereto, see **APPEAL AND ERROR**, 22; *People's State Bank v. Ruxer*, 420, 422 (4).

TRIAL—Continued.

Exceptions must be taken to giving of instructions in order to present question on appeal, see **APPEAL AND ERROR**, 21; *Indianapolis Traction, etc., Co. v. Grey*, 141, 143 (2).

Burden of proving property exempt from taxation, upon person so claiming, see **TAXATION**, 2; *Oak Hill Cemetery Co. v. Wells*, 479, 482 (3).

1. **Record.—Amendments.—Entries.—Nunc Pro Tunc.—Evidence.**—An exhibit to a complaint, unattached thereto, which is filed therewith and properly identified in such complaint may be shown, by a *nunc pro tunc* entry, to have been so filed therewith, the clerk's file mark and parol testimony substantiating such claim and no denial being made.

Cleveland, etc., R. Co. v. Porter, 226, 228 (1).

2. **General Denial.—Burden of Proof.**—Where defendant enters a general denial to plaintiff's complaint, the burden is upon plaintiff to prove the material allegations of his complaint.

Little v. Robinson, 104, 108 (1).

3. **Burden of Proof.—Master and Servant.—Assumed Risk.**—The burden is upon the servant to prove that the defect causing his injuries was not an assumed risk.

Evansville Gas, etc., Co. v. Raley, 342, 349 (5).

4. **Damages.—Aggravation of, by Plaintiff.—Defense.—Burden of Proof.**—The burden of showing plaintiffs' failure to use ordinary care to avoid the aggravation of damages caused by defendant's negligence, is on defendant.

Cromer v. City of Logansport, 661, 671 (10).

5. **Counterclaim.—Refusal of Permission to File.—Abuse of Discretion.**—It is not an abuse of discretion for the trial court to refuse to permit, when a cause is ready for trial, the filing of a counterclaim where a demurrer had just been sustained to one substantially the same.

Siebs v. Heilman Machine Works, 37, 38 (1).

6. **Evidence.—Surplusage.**—It is not necessary to offer any proof to support surplusage in the pleadings.

Hobbs v. Town of Eaton, 628, 632 (7).

7. **Instructions Requested Covered by Those Given.**—Where instructions requested are covered by those already given, a refusal to give those requested is not erroneous.

New York, etc., R. Co. v. Robbins, 172, 182 (9).

Home Ins. Co. v. Gagen, 680, 694 (14).

8. **Instructions.—Refusal.—When Harmless Error.**—The refusal to give an instruction not wholly good, or one substantially covered in another given, or that is inconsistent or adapted to confuse, or one containing supposed facts which the jury finds to have had no existence, is not error.

Home Ins. Co. v. Gagen, 680, 690 (11).

9. **Instructions.—Answers to Interrogatories.—Harmless Error.**—Where the answers to the interrogatories show the supposed facts embodied in an instruction to be untrue, the refusal to give such instruction is harmless error.

Home Ins. Co. v. Gagen, 680, 694 (15).

10. **Instructions.—Prejudicial.**—The giving of correct instructions cannot be considered as prejudicially affecting the jury.

Indianapolis Traction, etc., Co. v. Grey, 141, 143 (3).

TRIAL—Continued.

11. *Instructions.—Not Applicable to Evidence.*—Instructions, not applicable to the evidence, though correct statements of the law, are properly refused.
Never-Split Seat Co. v. Climax Specialty Co., 616, 617 (2).
12. *Instructions.—Defining "Acknowledgment."*—*Invasion of Province of Jury.—Descent and Distribution.*—The court has the right to instruct the jury as to what constitutes an "acknowledgment" of an illegitimate child, as provided by the act of 1901 (Acts 1901, p. 288, §2630a Burns 1901) providing that such child may, under certain conditions, inherit from the father.
Daggy v. Wells, 27, 29 (2).
13. *Instructions.—Peremptory.—Evidence.—How Considered.*—To determine the propriety of giving a peremptory instruction all facts and inferences should be considered against the party asking such instruction, and in case of conflict, all that evidence favorable to the asking party should be excluded.
Hall v. Terre Haute Electric Co., 43, 45 (1).
14. *Instructions.—Peremptory.—Contributory Negligence.*—Contributory negligence is a defense in a personal injury case, and a peremptory instruction for defendant is erroneous unless the facts and inferences are such that no other reasonable conclusion could be reached.
Hall v. Terre Haute Electric Co., 43, 46 (2).
15. *Instructions.—Refusal.—Harmless Error.—Answers to Interrogatories to Jury.*—The giving of an alleged erroneous instruction ignoring the question whether the operator of the defendant's elevator was acting within the scope of his authority when he agreed with plaintiff not to operate the same while plaintiff was at work thereunder, is harmless where the jury's answers to the interrogatories show that he was so acting when he made such promise.
Rink v. Lowry, 132, 137 (4).
16. *Instructions.—Refusal.—Answers to Interrogatories to Jury.*—The refusal to give an alleged correct instruction that neglect of duty by defendant will not excuse plaintiff from using his senses is not available error where the answers to the interrogatories to the jury show that plaintiff, with defendant's knowledge, was working in an elevator shaft where he was required to do his work and where he was required to keep his eyes on his work.
Rink v. Lowry, 132, 137 (5).
17. *Instructions.—Directing Verdict.—Invasion of Province of Jury.*—Where the determination of an issue involves the credibility of witnesses and rests upon influences to be drawn from facts proved, it is an invasion of the province of the jury to direct a verdict in favor of the party upon whom rests the burden.
Siebe v. Heilman Machine Works, 37, 42 (5).
18. *Instructions.—Assuming Facts.—Municipal Corporations.—Defective Streets.*—An instruction that plaintiff "had a right to assume," in the absence of notice, that the street over which he was traveling was safe and in good repair, is not bad as assuming that such street was in a dangerous condition.
City of Indianapolis v. Mullally, 125, 128 (3).
19. *Instructions.—Contributory Negligence.—Burden of Proof.*—An instruction in a personal injury case that the burden of proving contributory negligence is upon defendant and that

TRIAL—Continued.

plaintiff cannot recover if the preponderance of the evidence shows him guilty of contributory negligence is correct.

City of Indianapolis v. Mullally, 125, 129 (4).

20. *Instructions.—Assuming Facts.—Defective Streets.—Questions for Jury.*—An instruction that if a hole in the street was full of water, the question whether an ordinarily prudent man would assume that it indicated danger and drive around it, was, with all other proved facts, a question for the jury, is correct.

City of Indianapolis v. Mullally, 125, 130 (5).

21. *Instructions.—Street Railroads.—Failure to Look.*—An instruction that defendant street railroad company must use reasonable care to discover persons on its track; and its failure to do so, or failure to stop its car, when possible, after such discovery, resulting in injury, renders it liable for such injuries, is correct.

Indianapolis Traction, etc., Co. v. Smith, 160, 170 (6).

22. *Instructions.—Negligence.—Failure to Negative Contributory Negligence.*—An instruction that plaintiff should recover if defendant's negligence is established is not bad where, in other instructions, the jury were told that if plaintiff was guilty of contributory negligence he could not recover.

Indianapolis Traction, etc., Co. v. Smith, 160, 170 (7).

23. *Instructions.—Undisputed Facts.*—The court may assume in his instructions the truth of undisputed facts without invading the province of the jury.

Indianapolis Traction, etc., Co. v. Smith, 160, 171 (8).

24. *Instructions.—Street Railroads.—Persons in Peril.—Care Required.*—An instruction that the defendant street railroad company, after discovering a person in peril by the operation of its car, must exercise the highest degree of care to avoid his injury, is not erroneous.

Indianapolis Traction, etc., Co. v. Smith, 160, 171 (9).

25. *Instructions.—Street Railroads.—Failure to Look.*—An instruction that if the conditions were such that the motorman of defendant street railroad company's car could have seen plaintiff in peril by the exercise of ordinary diligence, and could have stopped his car in time to avoid the injury, and he failed to do so, defendant is liable therefor, provided plaintiff was not guilty of contributory negligence, is correct.

Indianapolis Traction, etc., Co. v. Smith, 160, 172 (10).

26. *Instructions.—Telegraphs and Telephones.—Failure to Transmit.*—An instruction, in an action to recover a penalty for the violation of §5511 Burns 1901, Acts 1885, p. 161, §1, that if plaintiff failed to show that defendant telegraph company set aside plaintiff's message and sent subsequently received messages ahead of it, the verdict should be for defendant, is erroneous.

Western Union Tel. Co. v. McClelland, 578, 586 (10).

27. *Insurance.—Instructions.—Confusing.*—Where the only loss recoverable under a policy was for damages by lightning, it is not error to refuse an instruction framed as if the policy covered loss by wind, cyclone or tornado as well as by lightning, such instruction being calculated to confuse the jury.

Home Ins. Co. v. Gagen, 680, 692 (12).

TRIAL—Continued.

28. *Insurance.—Instructions.—Answers to Interrogatories.*—It is not error in a lightning insurance case to refuse to instruct that the jury, though they are confined to the evidence in the case, are not precluded from using their own knowledge of lightning, wind and cyclones, and that, applying their knowledge, they may reject certain evidence which may appear to them incredible, and find that the fall of the barn was caused by a wind and cyclone and not by lightning, where the substance thereof was covered by other instructions and the answers to the interrogatories showed that the insured barn fell because of a stroke of lightning before the storm arrived, such instruction also being an invasion of the province of the jury.
Home Ins. Co. v. Gagen, 680, 693 (13).
29. *Negligence.—When Question for Jury.*—Where there reasonably may be a difference of opinion whether the defendant is guilty of negligence, the question is for the jury.
Stephens v. American Car, etc., Co., 414, 419 (3).
30. *Answers to Interrogatories.—Carriers.—Negligence.—Contributory.*—Answers by the jury showing that plaintiff was riding in the cupola of a caboose of a freight-train on a "shipper's pass;" that there were seats in the caboose; that the cupola was for trainmen and the seats were for passengers; that the caboose stayed on the track and plaintiff got off before the caboose stopped, do not show contributory negligence.
Southern R. Co. v. Roach, 211, 216 (9).
31. *Contributory Negligence.—Burden of Proof.—Verdict.—General.*—Contributory negligence is a defense in actions for personal injuries, and a general verdict for plaintiff is a finding of freedom from such negligence.
Union Traction Co. v. Sullivan, 513, 519 (2).
32. *Negligence.—General Damages.—Special.—Loss of Time.*—It is erroneous to permit plaintiff, in an action for personal injuries, wherein he demands general damages only, to recover damages for loss of time, earning capacity or business loss, such damage being special.
Union Traction Co. v. Sullivan, 513, 527 (9).
33. *Master and Servant.—Negligence.—Proximate Cause.—Interrogatories to Jury.*—An answer to an interrogatory to the jury, stating that plaintiff would not have received the injury complained of but for the defective condition of the derrick, shows such defect to be the proximate cause of the injury.
Bedford Quarries Co. v. Turner, 552, 563 (3).
34. *Municipal Corporations.—Waters.—Collection and Discharge.—Special Findings.*—Special findings, in an action against a municipal corporation for damages for the collection and discharge of water upon plaintiffs' lots, showing that defendant wrongfully collected and discharged waters upon such lots and caused certain damages; that plaintiffs placed the property injured upon such lots knowing that it would be injured if it remained and that it could have been removed and the damages avoided, are not sufficient for the Appellate Court to determine accurately whether judgment for such damages should have been awarded. *Cromer v. City of Logansport*, 661, 671 (11).

TRIAL—Continued.

35. *Municipal Corporations.—Waters.—Damages.—Decrease of Rental Values.—Special Findings.—New Trial.*—Where the special findings, in an action against a municipal corporation for damages for the collection and discharge of water upon plaintiffs' lots, show that great and recurring injury was done to such lots for several years; and damages were awarded only for injury to certain personal property upon such lots, a motion for a new trial should be sustained in order that the court could properly find the damages sustained to the lots.
Cromer v. City of Logansport, 661, 672 (12).
36. *Surviving Partners.—Current Reports.—Fraud.*—In an action on the bond of a surviving partner where the facts found fail to show that current reports of such partner were not fraudulent, such reports must be taken as valid.
Harrah v. State, ex rel., 495, 505 (10).
37. *Railroads.—Setting Fires.—Burden of Proof.—Presumptions.*—In an action against a railroad company for negligently setting fires, the burden of proof is upon plaintiff; and negligence is not presumed from the fact alone that fire was communicated from its engine.
Baltimore, etc., R. Co. v. O'Brien, 143, 144 (1).
38. *Telegraphs and Telephones.—Failure to Transmit Messages.—Defense.—Burden of Proof.*—The burden is upon the telegraph company to prove that an apparently unreasonable delay in transmitting a telegram was caused by the transmission of other prior messages.
Western Union Tel. Co. v. McClelland, 578, 586 (9).
39. *Pleading.—Proof.—Variance.—Negligence.*—Where the complaint alleges injuries caused by the negligence of defendant in the use of rotten and insufficient timbers in a derrick, and the proof shows injuries caused by the breaking of an iron hook connecting a guy wire to the top of the mast, there is a fatal variance.
New Castle Bridge Co. v. Steele, 194, 195 (1).
40. *Pleading.—Proof.—Variance.—Carriers.—Railroads.—Negligent Operation of Train.*—Evidence of a defective truck, causing plaintiff's coach to be sidetracked and plaintiff to be injured, is not a variance from the complaint alleging a negligent operation of the train.
Cincinnati, etc., R. Co. v. Bravard, 422, 425 (1).
41. *Complaint.—Theory.—Evidence.—Variance.*—Where the complaint proceeds upon a definite theory and the evidence shows a substantially different one to be true, no recovery is permitted.
Cool v. McDill, 621, 623 (3).
42. *Venire de novo.—Time for Motion.*—A motion for a *venire de novo* made after final judgment should be overruled because too late.
McCaslin v. State, 184, 188 (5).
43. *Conclusions of Law.—Exception.—When Taken.—Appeal and Error.*—An exception to the conclusions of law taken at the time of stating such conclusions is sufficient to question same on appeal, though such conclusions were not stated until after the overruling of the motion for a new trial, such exception being an admission that the facts were fully and correctly found.
Indianapolis, etc., Traction Co. v. Harbaugh, 115, 120 (5).

TRIAL.—Continued.

44. *Directing Verdict for Party Having Burden of Proof.*—The court should not direct a verdict for the party having the burden of proof where the verdict must be based on the testimony of witnesses, wholly or partially.
Stephens v. American Car, etc., Co., 414, 419 (4).
45. *Interrogatories to Jury.—Conclusions.*—It is not error to refuse to submit to the jury an interrogatory as to whether the condition of the street, on which the injury occurred, was such as to warn persons of probable or possible danger, since facts and not conclusions should be asked for.
City of Indianapolis v. Mullally, 125, 131 (7).
46. *Answers to Interrogatories.—When Controlling.—Presumptions.*—Answers to interrogatories to the jury control the general verdict only when in irreconcilable conflict therewith, the presumptions all being in favor of the general verdict.
Anderson v. Citizens Nat. Bank, 190, 193 (3).
47. *Answers to Interrogatories.—Irreconcilable.—Test.*—Answers to interrogatories to the jury are irreconcilable with the general verdict only when such answers together with all other facts provable under the issues cannot be consistent with such general verdict. *Anderson v. Citizens Nat. Bank*, 190, 193 (4).
48. *Interrogatories to Jury.—Irresponsive.—Refusal to Submit.*—It is not error to refuse to submit interrogatories to the jury where the facts sought are unresponsive to the issues.
People's State Bank v. Ruxer, 420, 421 (2).
49. *Complaint.—Special Findings.—When Same Questions Presented.*—Where the special findings contain the same facts as alleged in the pleadings, a decision on such findings renders useless a decision on such pleadings.
Aetna Life Ins. Co. v. Stryker, 312, 321 (2), 328 (2).
50. *Special Findings.—General.*—Where a special finding of facts is asked and furnished, a general finding given in connection therewith will be disregarded.
Aetna Life Ins. Co. v. Stryker, 312, 321 (1).
51. *Special Findings.—Failure to Find Fact.—Presumption.—Deeds.—Quitclaim.*—A failure to find the character of a deed relied upon by the defense raises the presumption that such deed was a quitclaim, where the result required such finding, all reasonable presumption being indulged to uphold the action of the trial court. *Aetna Life Ins. Co. v. Stryker*, 312, 332 (16).
52. *Special Findings.—Failure to Find Fact in Defense.—Effect.*—A failure by the court to find a fact alleged as a defense is a finding against defendant on such issue.
Aetna Life Ins. Co. v. Stryker, 312, 325 (6).
53. *Special Findings.—Agreed Facts.—Evidence.—Exclusion.—Appeal and Error.*—Where the special findings show that the facts therein set out have been agreed upon by the parties, exclusion of evidence bearing thereon is harmless.
Fleener v. Johnson, 334, 339 (5).
54. *Special Findings.—Facts.—Conclusions of Law.—Damages.*—A "conclusion of law" that all of the plaintiffs' merchandise damaged as shown in the findings was injured by reason of

TRIAL—Continued.

plaintiffs' placing it on the ground floor where they knew it would be damaged; that plaintiffs failed to use reasonable care in the prevention of such injury and that their subsequent negligence in failing to use such due care was the proximate cause of the injury, is in reality a finding of a fact.

Cromer v. City of Logansport, 661, 667 (1).

55. *General Verdict.—Effect.*—A general verdict in favor of plaintiff is a finding in his favor on all of the issues.

Cincinnati, etc., R. Co. v. Bravard, 422, 426 (2).

56. *General Verdict.—Answers to Interrogatories to Jury.—Conflict.*—Where there is not an irreconcilable conflict between the answers to the interrogatories to the jury and the general verdict, the latter prevails.

Pittsburgh, etc., R. Co. v. Harris, 77, 78 (1).

57. *Limitation of Actions.—General Verdict.—Special.*—A general verdict for plaintiff is a finding against defendants upon their defense of the statute of limitations, and where the answers to the interrogatories to the jury do not show otherwise, such verdict is conclusive on appeal.

Lindley v. Kemp, 355, 369 (9).

58. *Verdict.—General.—Special.—Irreconcilable.—Test.*—If, considering the pleadings, facts could have been proved which would support the general verdict regardless of the answers to the interrogatories to the jury, the general verdict controls.

Lindley v. Kemp, 355, 368 (6).

59. *Negligence.—Contributory.—General Verdict.*—A general verdict for plaintiff in a personal injury case is a finding that defendant was guilty of one or more of the acts of negligence alleged and that plaintiff was free from contributory negligence.

Southern R. Co. v. Roach, 211, 216 (8).

60. *General Finding.—Itemizing Damages.—Surplusage.—Appeal and Error.*—Where a special finding is not called for and a general finding is made, the court's items of damages sustained by plaintiff will be considered as surplusage; and the court will not consider whether such items are sustained by the evidence.

Over v. Dehne, 427, 435 (8).

61. *Verdict.—General.—Special.—When Controlling.*—The answers to the interrogatories to the jury control the general verdict only when they are irreconcilable therewith upon any state of facts provable under the issues.

Lindley v. Kemp, 355, 366 (5).

Southern R. Co. v. Roach, 211, 216 (7).

Union Traction Co. v. Sullivan, 513, 520 (3).

Rink v. Lowry, 132, 136 (3).

TRUSTS—

See **WILLS**.

Notes payable out of funds of, see **BILLS AND NOTES**, 2; *Agnew v. Agnew*, 16.

Sufficiency of complaint to show plaintiff's payment for real estate, see **PLEADING**, 55; *Holliday v. Perry*, 588, 596 (4).

1. *Parol.—Husband and Wife.—Real Property.*—A trust is not created by the husband's securing conveyances of real estate

TRUSTS—Continued.

which he paid for to be taken in the wife's name upon an oral promise by her to reconvey to him when the purchase price was fully paid, such agreements being made prior to the act of 1881 (Acts 1881, p. 527). *Shipley v. Shipley*, 48, 50 (1).

2. *Resulting.—Lands.—Grantees.—Payment of Purchase Money by Another.*—Under §3398 Burns 1901, §2976 R. S. 1881, a resulting trust may be created: (1) Where the grantee takes the legal title without the consent of the person paying the purchase money; (2) where the grantee has taken the title, paying the purchase price, in violation of his trust, with money of another, and (3) where the grantee by agreement is to hold the legal title in trust for the person who pays all or a part of the purchase price. *Holliday v. Perry*, 588, 596 (2).
3. *Constructive.—How Created.*—Courts will declare a constructive trust where necessary in order to work out right and justice, regardless of the intention of the parties. *Holliday v. Perry*, 588, 596 (3).
4. *Fraud.—Refusal to Convey to Person Who Paid Purchase Money.*—The taking of the legal title by defendant to lands partly paid for by plaintiffs upon an agreement, free from fraud, subsequently to convey to them, becomes fraudulent upon his refusal so to convey. *Holliday v. Perry*, 588, 597 (5).
5. *Resulting.—Accounting.—Coal Mines.*—Where defendant fraudulently retained the legal title to, and operated coal mines belonging partly to plaintiffs, and refused to account, or to give an inspection of the books, he may be compelled by a court of equity to account to them for their interests therein. *Holliday v. Perry*, 588, 599 (14).

TURNABLES—

See RAILROADS.

ULTRA VIRES—

See CONTRACTS.

VACANCIES—

See INSURANCE.

VARIANCE—

See TRIAL, 39-41.

Allegation that injury occurred while servant was working outside of scope of employment, not supported by proof that it happened within scope, see PLEADING, 27; *Adams v. Central Ind. R. Co.*, 607, 610 (1).

VENDOR AND PURCHASER—

See SALES; TRIAL; TRUSTS.

Complaint on contract of purchase, see PLEADING, 6; *Holliday v. Perry*, 588, 597 (6).

1. *Defective Title.—Notice.—Lis Pendens Record.*—Defendant, purchasing lands while a *lis pendens* notice was filed questioning the title thereto, is not an innocent purchaser, but takes such title burdened with the equities.

Aetna Life Ins. Co. v. Stryker, 812, 321 (3), 328 (3).

VENDOR AND PURCHASER—Continued.

2. *Defective Title.—Lis Pendens Notice.—Dismissal of Suit.*—The subsequent dismissal by plaintiff of his suit in which he had filed a *lis pendens* notice does not constitute defendant an innocent purchaser of the lands in question, where he bought such lands during the pendency of such notice and suit.
Aetna Life Ins. Co. v. Stryker, 312, 322 (4).
3. *Contracts.—Discharge.—Real Estate.—Purchase Money.*—Where plaintiffs and defendant agreed in writing to buy lands, and plaintiffs borrowed from defendant their part of the money with which to pay for such lands, and such lands were so bought and paid for, such contract was fully performed, such borrowed money in legal effect being theirs.
Holliday v. Perry, 588, 597 (7).
4. *Title.—Defects.—Purchase Pendente Lite.*—A purchaser *pendente lite* takes the title to the lands purchased burdened with the defects.
Aetna Life Ins. Co. v. Stryker, 312, 330 (14).

WAIVER—

Of alleged error, by failure to discuss in brief, see **APPEAL AND ERROR**, 10-14.

Of defect in jurisdiction over party sued in wrong county, see **JURISDICTION**, 1; *Chicago, etc., R. Co. v. Marshall*, 217, 222 (1).

Necessary to allege in complaint for insurance, see **PLEADING**, 21; *Home Ins. Co. v. Gagen*, 680, 685 (5).

Of written notice by acting upon oral, see **SALES**, 9; *Siebs v. Heilman Machine Works*, 37, 41 (3).

WARRANTY—

See **SALES**.

WASTE—

See **LIFE ESTATES**.

Meaning of, see **WORDS AND PHRASES**, 3; *Brugh v. Denman*, 486, 488 (3).

WATERS AND WATERCOURSES—

City may not collect and discharge on private property, see **MUNICIPAL CORPORATIONS**, 7; *Cromer v. City of Logansport*, 661, 668 (3).

City cannot be given eight months to abate a nuisance in its street, see **INJUNCTION**, 4; *Cromer v. City of Logansport*, 661, 672 (13).

1. *Obstructions.—Liability.*—Any person obstructing a water-course to the damage of another, whether negligent or not, is liable therefor.

Lewis Tp. Improv. Co. v. Royer, 151, 155 (5).

2. *Obstructions.—Nuisance.—Drains.*—A judgment in a drainage proceeding is no defense to a suit to enjoin the maintenance of a dam in a watercourse, which has been running in a regular channel between well-defined banks from time immemorial, where such portion of such stream was not obliterated, superseded or deprived of its character as a natural water-course by such judgment.

Mindnich v. Kline, 202.

WIDOWS—

See HUSBAND AND WIFE.

WILLS—

Post-testamentary declarations of testator admissible to corroborate other proof of lost will, see EVIDENCE, 19; *Inlow v. Hughes*, 375, 381 (1).

1. *Construction.—Intention.*—Courts are guided in the construction of a will by the intention of the testator, and where not in contravention of law, such intention will be given effect.

Matlock v. Lock, 281, 292 (1).

2. *Estates Devised.—Determinable Fee.*—A will devising in fee, to a grandchild, certain real estate provided such grandchild pays all taxes, keeps up necessary repairs and does not encumber by mortgage or sell said real estate before she arrives at the age of forty, and if she die or "attempt to convey, mortgage or encumber all or any part of said real estate," then over to other devisees, creates in such grandchild a determinable fee. *Per* Roby, J., and Comstock, C. J. It creates a conditional fee. *Per* Wiley, J.

Matlock v. Lock, 281, 293 (2).

3. *Real Estate.—Alienation.—Suspending Power of.—Statutes.*—A will devising lands to a grandchild and if such grandchild shall, before she arrives at the age of forty, "attempt to convey, mortgage or encumber all or any part of said real estate," then over to other devisees, does not violate §3382 Burns 1901, §2962 R. S. 1881, providing that the power to alienate shall not be suspended longer than the existence of a life in being, etc., since such devisee is a life in being at the time such will takes effect.

Matlock v. Lock, 281, 304 (3).

4. *Bequests.—Trusts.*—A bequest to testator's grandchild to be held in trust until such grandchild arrives at the age of forty, at which time such bequest shall be delivered absolutely, is valid and it is the duty of the trustee to administer such trust until such time arrives.

Matlock v. Lock, 281, 306 (4).

5. *Remainders.—Time of Vesting.—Words of Survivorship.*—The law favors the earliest possible vesting of remainders; and words of survivorship in a will are construed as relating to the time of the death of the testator unless the will clearly says otherwise.

Burton v. Carnahan, 612, 614 (1).

6. *Construction.—Rules of Law.—Conflict.*—The intention apparent in a will, will be given effect where it does not interfere with the established rules of law.

Burton v. Carnahan, 612, 614 (2).

7. *Devises.—Limiting by Subsequent Clause.*—A certain estate devised in one clause of a will cannot be defeated by a subsequent clause, though the intention to do is clear.

Burton v. Carnahan, 612, 614 (3).

8. *Estates.—Rule in Shelley's Case.*—A will devising certain lands to a daughter "to be by her held during her natural life and no longer, and at her death the same to go to and vest in her bodily heirs forever and in fee simple," and providing in a subsequent clause that in case said daughter "should die without issue of her body living," then over to her brothers and sisters, gives such daughter a fee-simple title to such lands.

Burton v. Carnahan, 612, 615 (4).

WILLS—Continued.

9. *Remainders.—Vesting.*—Where a will devises a fee-simple title to a daughter and provides in a subsequent clause that in case such daughter "should die without issue of her body living" then such land should go to her brothers and sisters, the contingency of the daughter's death has reference to her death before the death of such testator.

Burton v. Carnahan, 612, 615 (5).

10. *Lost or Destroyed.—Probate.—Witnesses.—Statutes.—Evidence.*—Under §2779 Burns 1901, §2609 R. S. 1881, the establishment and probate of an alleged lost or destroyed will requires the testimony of two witnesses to the provisions thereof, the testimony of the attorney drafting such will supported by the testimony of the principal devisee substantiating only a part of the provisions of same being insufficient to establish the whole of such will, and post-testamentary declarations of the testator are not sufficient to supply the necessary testimony of the other witness to such provisions, as required by such statute.

Inlow v. Hughes, 375, 390 (2).

WITNESSES

Number to establish lost will, see **WILLS**, 10; *Inlow v. Hughes*, 375, 390 (2).

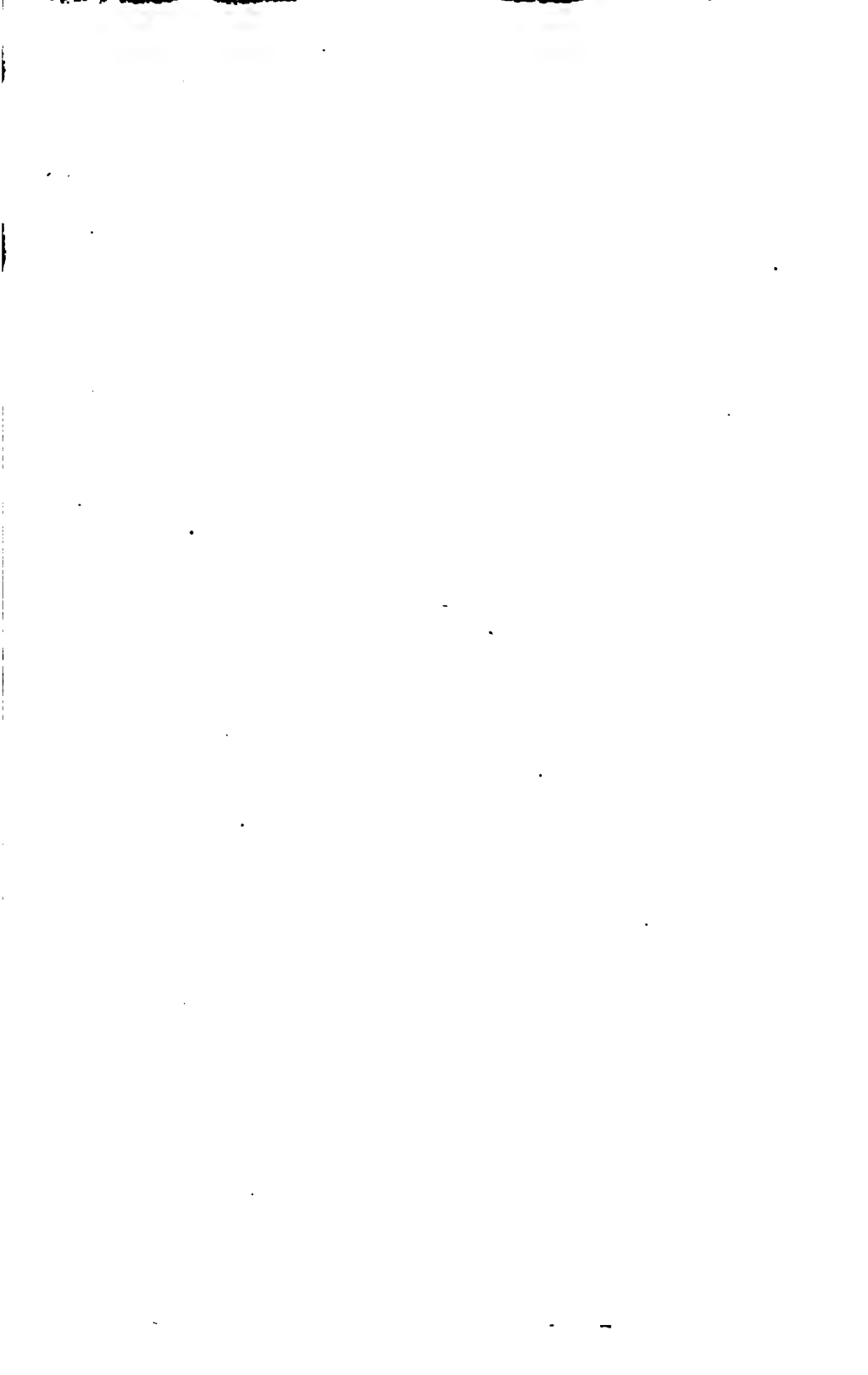
WORDS AND PHRASES—

See **MAXIMS**.

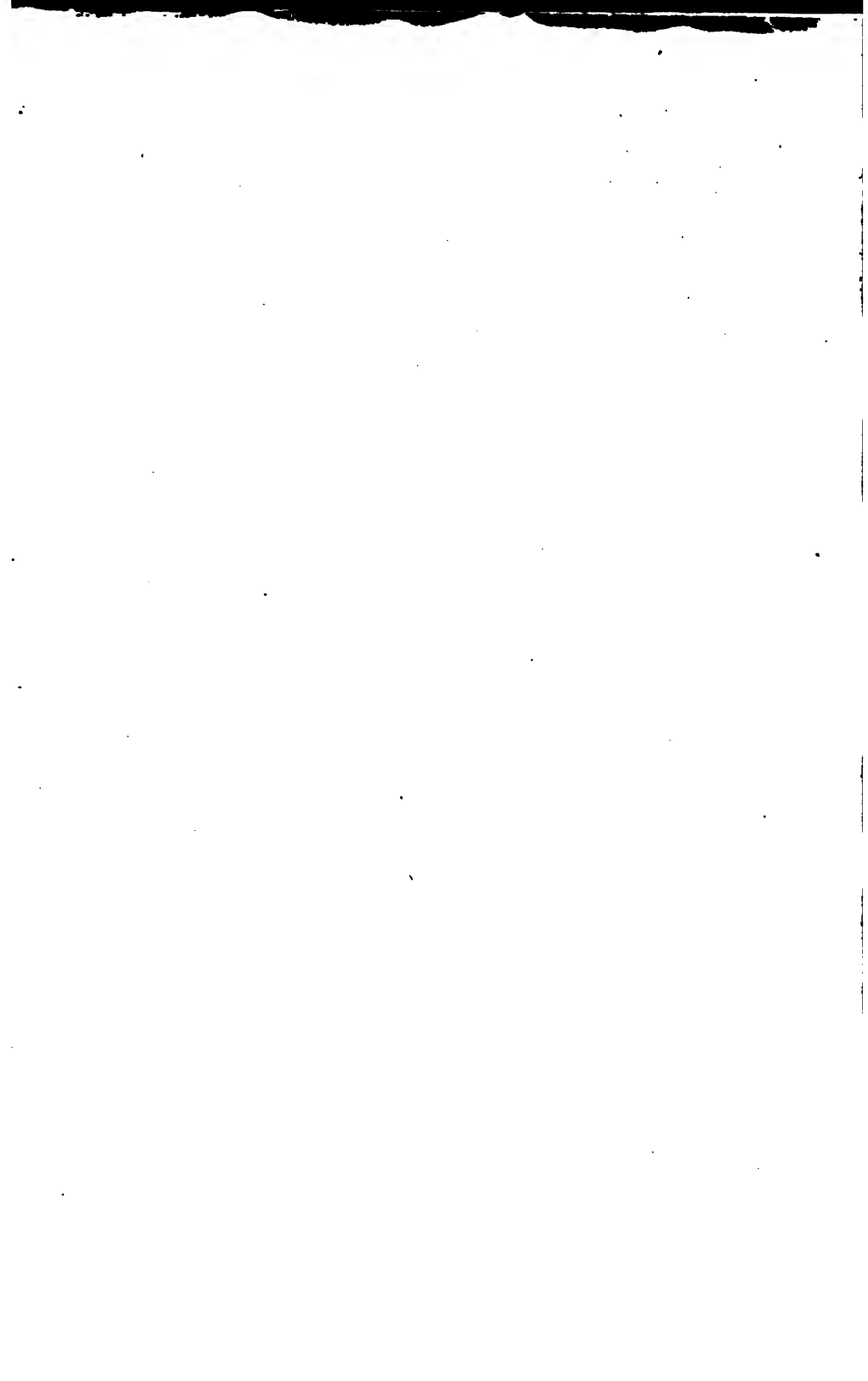
1. *"Holiday."*—The word "holiday" means a consecrated day, a day of cessation from ordinary labor.
State v. Shelton, 80, 87 (5).
2. *"Trial"*—The word "trial" includes all of the steps taken in a cause from submission to the jury to the rendition of judgment.
Lindley v. Kemp, 355, 359 (3).
3. *"Waste."*—"Waste," at the common law, was the destruction of real property, by a person in possession not having the inheritance, to the injury of the immediate remainder or reversion in fee.
Brugh v. Denman, 486, 488 (3).
4. *"Device."*—A "device" is a thing devised or formed by design, a contrivance, an invention.

Collins v. State, 625, 626 (1).

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